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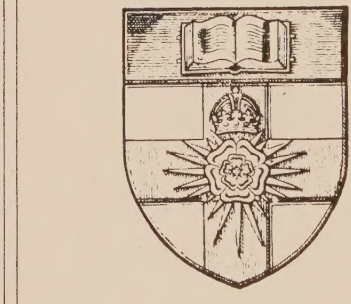

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The Right Hon. Ignatius J. O'Brien.

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CORRIGENDUM.

Page 217, foot-note *after* "42," *insert* "Ir."

MEMORANDA.

In the Trinity Vacation, 1912, The Rt. Hon. R. E. Meredith, M. R., resigned.

The Rt. Hon. C. A. O'Connor, His Majesty's Attorney-General, was appointed Master of the Rolls.

Ignatius J. O'Brien, Esq., K.C., His Majesty's Solicitor-General, was appointed Attorney-General.

And Thomas F. Molony, Esq., K.C., His Majesty's Third Serjeant-at-Law, was appointed Solicitor-General.

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND.

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1912.

TAYLOR'S TRUSTS; TAYLOR *v.* BLAKE.

Wylie, J., for M. R.
1911.
June 30.
July 7.

(1911. No. 449.)

Will—Construction—Life interest to daughter and to surviving husband—Remainder to "issue" upon death or re-marriage of husband—"Issue," meaning of—Word of purchase or of limitation—Shelley's Case, Rule in—Perpetuities, Rule against.

By his will, dated 31st October, 1883, a testator appointed trustees and gave to them his property of every kind with powers of management, and provided as follows:—"And as to the rest, residue, and remainder of my property I direct the income thereof to be paid to and amongst my four children (naming them) in equal shares during their natural lives, and after the decease of any one or more of them leaving a husband or wife him or her surviving, then the share of such deceased child or children to be in trust for such husband or wife him or her surviving, for the term of each of their natural lives or until they re-marry, and after their respective deaths or re-marriage then to the issue (if any) of such deceased child, and in case of no such issue to go to or amongst my surviving children or child, or their, his, or

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her issue; and I further direct that all the benefits conferred by this my will shall be had and enjoyed without power of anticipation by the persons or person for the time being otherwise entitled for their lives or life as aforesaid."

The testator died 22nd August, 1889. One of the testator's children was married and had children living at the date of the will. The other three children were married after the date of the will. The bulk of the property subject to the trusts consisted of chattels real, and there was also some real estate.

Held: (1) that in the devise "to the issue (if any) of such deceased child" the word "issue" was a word of purchase and not of limitation, both as regards the real and personal estate of testator. (2) That the word "issue" included all descendants, limited in each case to such of them as were living at the time when the gift in each case took effect. (3) That, as the class constituting "issue" might not be ascertainable within legal limits, the gift to such issue, as well as the gift over in default of issue, was void as infringing the rule against perpetuities.

ORIGINATING SUMMONS.

By his will, dated 31st October, 1883, Thomas Taylor appointed trustees, and gave to them his property of every kind, with powers of management, and after certain other provisions, he provided as follows:—"And as to the rest, residue, and remainder of my property, I direct the income thereof to be paid to and amongst my four children, Sarah Grandison, Emma, Henry, and Elizabeth Balderson Taylor, in equal shares, during their natural lives; and, after the decease of any one or more of them, leaving a husband or wife him or her surviving, then the share of such deceased child or children to be in trust for such husband or wife, him or her surviving, for the term of each of their natural lives, or until they re-marry, and after their respective deaths or re-marriage then to the issue (if any) of such deceased child, and in case of no such issue to go to or amongst my surviving children or child, or their, his, or her issue; and I further direct that all the benefits conferred by this my will shall be had and enjoyed without power of anticipation by the persons or person for the time being otherwise entitled for their lives or life as aforesaid."

The testator died 22nd August, 1889, and probate of his will was granted on 4th October of the same year.

He left four children surviving him: the plaintiff, the Reverend Henry Taylor; the defendant Mrs. Allen; Mrs. Macrory (widow),

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and Mrs. Grandison. Mrs. Grandison was married, and had children living at the date of the testator's will. The Rev. Henry Taylor, Mrs. Allen, and Mrs. Macrory were married after the date of the will. Mrs. Grandison died intestate on 7th June, 1901, leaving her husband surviving her, and he died without having re-married on 16th January, 1911. There was issue of the marriage five children, of whom two pre-deceased the testator. Of the three other children, one, Edith, was born in 1868, and married a Mr. Blake, having issue one child, born in 1906. The second surviving daughter, Olive, was born in 1877, and married the Reverend Dr. Kidd, and had two children, one of whom was the defendant, Basil Kidd. The third surviving daughter, Madeline, was born in 1880, and had married Mr. Charles Bewley, but had no issue. The Rev. Henry Taylor, Mrs. Allen, and Mrs. Macrory had children who were living.

The property, subject to the trusts of the will, consisted of (1) leasehold lands and premises in the City of Dublin, held under lease for a term of 250 years from the year 1874, and producing a net annual rental of about £900 a year; and (2) freehold premises in the City of Dublin, held under fee-farm grant at the yearly rent of £13 12*s.* 7*d.*, and yielding a net annual rent of about £55.

The trustees of the will issued an originating summons, asking for the determination of the following questions and matters:—

(1) Is the word "issue" in the residuary gift in the said will, "to the issue (if any) of such deceased child," to be interpreted as a word of limitation or a word of purchase—(*a*) with respect to the testator's real estate; (*b*) with respect to his chattel real estate?

(2) If the word "issue" in the said gift is to be construed as a word of purchase, are the persons to take under the said gift restricted to any, and, if so, to what class of issue?

(3) Does the said gift fail to any, and, if so, to what extent by reason of the same infringing the rule against perpetuities?

(4) If the Court shall be of opinion that the said gift fails to any extent, whether the said gift, or any or what part thereof so failing, is undisposed of by the said will?

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R. W. Lucas, for the trustees of the will (one of whom was also the heir-at-law of the testator), submitted the questions for the decision of the Court.

Oulton, K.C., for the defendant, Basil Kidd, an infant, one of the great-grandchildren of the testator.

First, the word "issue" is a word of purchase and not of limitation. This is clear as far as the personalty is concerned. A gift of personalty to A for life, and then to his issue, confers a life estate only on the first taker, and an absolute estate on the issue, and the rule in *Shelley's Case* (1) has no application : *Knight* v. *Ellis* (2); *Ex parte Wynch* (3); *Foster* v. *Wybrants* (4); and this construction would not be altered by the fact that realty was granted in the same clause so as to confer an estate tail in the latter: *Herrick* v. *Franklin* (5). It is submitted, however, that by reason of context the word "issue" in the present case is a word of purchase also in respect of the realty. Superadded words following "issue," which is not a technical word, will more readily tend to show that it is used as a word of purchase than if they followed "heirs of the body": *Parker* v. *Clark* (6). Here the word is followed by a direction that those who take for life are to be restrained from anticipation. Besides, the whole trust vested in the trustees is of an executory character, and in such cases the intention as expressed in the language used will be carried out, and, accordingly, an estate for life with remainder to the issue will not, in such cases, be construed as conferring an estate tail, but only a life estate on the first taker, with remainder to the issue, that is to say, "issue" will be read as a word of purchase, not of limitation : *Meure* v. *Meure* (7); *Leonard* v. *Lord Sussex* (8); *Stonor* v. *Curwen* (9); *Thompson* v. *Fisher* (10); *Ryan* v. *Cowley* (11).

Secondly, the word "issue," if a word of purchase, *prima facie* means "all descendants": *Dixon's Trusts* (12); *Denis' Trusts* (13);

(1) 1 Co. 93, b.
(2) 2 Bro. C. C. 569.
(3) 5 D. M. & G. 188.
(4) I. R. 11 Eq. 40.
(5) L. R. 6 Eq. 593.
(6) 3 Sm. & G. 161.
(7) 2 Atk. 265.
(8) 2 Vern. 526.
(9) 5 Sim. 264.
(10) L. R. 10 Eq. 207.
(11) Ll. & G. temp. Sugden 7.
(12) I. R. 4 Eq. 1.
(13) I. R. 10 Eq. 81.

Donoghue v. *Brooke* (1). And all descendants who survive the period of distribution take as joint-tenants: *Re Corlass* (2).

Thirdly, though a power to appoint may be exercised in such a way as to be bad, that does not make the power void: a power to appoint to issue may be exercised so as to exceed the limits allowed by the rule against perpetuities; but if it, in fact, is exercised in favour of objects within the limits, it is a valid appointment, and a power to appoint to special objects would, in default of appointment, be carried out by the Court as a trust. In the present case there is no power, but a trust in favour of issue; and the Court should carry out the trust in favour of objects within the legal limits: *Slark* v. *Dakyns* (3).

J. H. S. Russell, for Mrs. Blake, one of the grandchildren of testator:—

The question for decision is, "Is 'issue' a word of limitation or a word of purchase," first as to real estate; secondly, as to chattels real? As to real estate, this is covered by the rule in *Shelley's Case* (4), which applies, whatever the words of limitation may be: Jarman on Wills, page 1866; *Woodhouse* v. *Herrick* (5); *Warren* v. *Travers* (6). As to the chattels real, the circumstances of the two sets of property being jointly dealt with may fairly be taken into account on the question whether there is "an eye to an entail": Jarman on Wills, p. 1201.

At date of the testator's will Mrs. Grandison was married; the other three children were unmarried. The testator, by his will, in effect made a marriage settlement in favour of Mrs. Grandison and her then husband, and her issue, and also in favour of his three other children, their possible husbands or wives, and their issue.

In Ireland in a settlement of personalty by deed or will on a person and his issue, the word "issue" *prima facie* means children: *In re Dixon's Trusts* (7); *In re Denis' Trusts* (8); *Harris* v. *Loftus* (9); Jarman on Wills, p. 1596, note (*v*). Issue is a word

(1) I. R. 9 Eq. 489.
(2) 1 Ch. Div. 460.
(3) L. R. 10 Ch. 35.
(4) 1 Co. 93, b.
(5) 1 K. & J. 352.
(6) I. R. 2 Eq. 455.
(7) I. R. 4 Eq. 1.
(8) I. R. 10 Eq. 81.
(9) [1899] 1 I. R. 491.

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of flexible interpretation, and must be taken here in its restricted sense as meaning children, and not be enlarged to mean all descendants.

The result of taking the extended meaning of the word "issue" would be that Mrs. Blake, instead of taking one-third of her mother's share, would only take same share as her own child, and Mrs. Kidd would only take half as much as her children. A construction which makes parents and children take *per capita* will not be willingly adopted by the Court: *Cancellor* v. *Cancellor* (1).

Jefferson, K.C., for Mrs. Allen, one of the children of the testator.

As to the realty. The rule in *Shelley's Case* (2) applies, and each child of the testator takes an estate tail in one-fourth part of the same, subject to any outstanding life estate. The rule applies because the course of descent has not been altered by the superadded words relied on by Mr. Oulton, and because this is not a case of an executory trust giving directions for the making of a future settlement: Challis's Law of Real Property, pp. 165, 166; Fearne Cont. Rem., vol. i., 276; 1 Preston on Estates, 323; Tudor on Real Property, 351.

As to the chattel real estate. There is a life estate given to each child, and no more: *Ex parte Wynch* (3); *Longworth* v. *Campbell* (4). "Issue" is then a word of purchase, and includes all descendants, and all come in who are in existence at the time of vesting in possession: Theobald on Wills, p. 318; *Berry* v. *Fisher* (5); *Hobbs* v. *Tuthill* (6). But that point of time arises when the life interest given to the surviving husband or wife (as the case may be) of each child has determined, but *non constat* that a surviving husband or wife might have been unborn at the date of the testator's death, and consequently the limitation in favour of "issue" is void for remoteness, as being a limitation to a class which might possibly be unascertainable until the expiration of a period of time lasting longer than a life or lives in being at

(1) 2 Dr. & Sm. 194.
(2) 1 Co. 93, b.
(3) 5 D. M. & G. 188.
(4) [1910] 1 I. R. 23.
(5) [1903] 1 I. R. 484.
(6) [1895] 1 I. R. 115.

testator's death and twenty-one years afterwards: Underhill and Strahan on the Law of Wills, p. 110; Marsden's Rule Against Perpetuities, pp. 103, 175; Jarman on Wills, p. 327: *Lett* v. *Randall* (1); *Pearks* v. *Moseley* (2); *Blight* v. *Hartnoll* (3).

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There is consequently an intestacy as regards the *corpus* of the testator's personal property; and on the determination of existing life estates each one-fourth share becomes divisible among the four next-of-kin of testator.

WYLIE, J.:— July 7.

By his will, dated 31st October, 1883, Thomas Taylor gave to trustees all his property of every kind for the purposes thereinafter mentioned, and, after giving his wife, Sophia Taylor, all his furniture, &c., and household effects absolutely, and a life interest in certain freehold property and a life annuity of £50, he disposed of the residue of his property in these words: "And as to the rest, residue and remainder of my property, I direct the income thereof to be paid to and amongst my four children, Sarah Grandison, Emma, Henry, and Elizabeth Balderson Taylor, in equal shares during their natural lives; and, after the decease of any one or more of them leaving a husband or wife him or her surviving, then the share of such deceased child or children to be in trust for such husband or wife for the term of each of their natural lives, or until they re-marry, and after their respective deaths or re-marriage then to the issue (if any) of such deceased child, and in case of no such issue to go to and amongst my surviving children or child or their, his, or her issue."

It is upon that disposition of the residue of the testator's property that the several questions submitted to me arise. It is all one clause, and, whether drawn by a lawyer or a layman, it is very carefully worded, and I venture to think that to the mind of any intelligent layman it would present no difficulty. I think nine out of ten such laymen on reading the clause would say that each of the four children of the testator took an estate for his or her life in one-fourth of

(1) 3 Sm. & G. 83.
(2) 5 App. Cas. 714, 719.
(3) 19 Ch. D. 294.

Wylie, J., for M. R. 1911. — TAYLOR v. BLAKE.

the residuary estate, that upon the death of any one of them leaving a husband or wife surviving the share of such deceased child would go to such husband or wife for his or her life or until re-marriage, and after his or her death or re-marriage, to the issue of such deceased child if any then living absolutely, and if no such issue then living, to go amongst the other children of the testator then living and the issue (if any) of any such child then dead absolutely; such issue taking only such child's share. That seems to me to be the plain meaning of the clause, taking the words used in their ordinary natural sense, though the legal effect of so reading the clause is not quite so simple, and I shall deal with that hereafter.

Four legal questions have been raised as to the true construction of this clause. The first is, whether in the devise "to the issue (if any) of such deceased child" the word "issue" is a word of limitation or a word of purchase. It is well settled as laid down by Lord Cranworth in *Roddy* v. *Fitzgerald* (1). "The word 'issue' when it is used in a will is *prima facie* a word of limitation: that is to say, a gift to A.B. and his issue gives him an estate tail; it is the same as a gift to him and the heirs of his body. But if the context makes it apparent that the word is not so used, then it may be treated as a word of purchase."

Now, is there anything in the context here making it apparent that the word "issue" is not used as a word of limitation, but as a word of purchase? The testator, when he made his will, had four children and some grandchildren; and, having devised all his property to trustees, he directs the income to be paid to and amongst his four children in equal shares during their natural lives, and after the decease of any one of them leaving a husband or wife surviving them, the share of such one to be in trust for such husband or wife for his or her life or until re-marriage, and after his or her death or re-marriage, then to the issue (if any) of such deceased child. Now, stopping there for a moment, and bearing in mind that one of the children had issue living at the date of the will, it seems to me that the words "then to the issue (if any)" clearly mean that upon the death of the

(1) 6 H. L. C. 823, 872.

husband or wife of a deceased child such child's share was to go absolutely to the issue of such child, if any then living, as a direct gift to such issue, and I think this is made more clear by the devise over (which is also governed by the word "then") "in case of no such issue" to the surviving children or child, their, his, or her issue, clearly by way of substitution. I therefore hold that as regards the real estate the word "issue" is a word of purchase. As regards the chattels real and other personal estate, it is well settled that the word "issue" in a case like this is a word of purchase. The authorities on this are reviewed and acted upon by the Master of the Rolls in the recent case of *Longworth* v. *Campbell* (1).

The second question put to me is, If the word "issue" is a word of purchase, are the persons to take under such gift restricted to any, and if so to what, class of issue? I have practically answered this in stating my view as to the meaning of the will in deciding the first question. The word "issue" either means children, or it means issue generally. In *Berry* v. *Fisher* (2), the Vice-Chancellor says: "It may still I think be regarded as settled that the word "issue" when not restrained by the context comprehends objects of every degree. This therefore is *prima facie* the meaning of the word, and it lies on anyone contending for a narrower interpretation to maintain that the context has this effect." There are many authorities supporting that view which I need not refer to. Now, according to the view I have already expressed as to the meaning of this will, the context instead of favouring the restricted construction is against it; and therefore I hold that the word "issue" in this will includes all descendants, but the devise is of course limited to such of them as are living at the time when the gift in each case takes effect.

The third question is—Does the gift fail to any, and if so to what, extent by reason of the rule against perpetuities? Now it was suggested in argument that the word "issue" being a flexible word, capable of several meanings, I ought if possible to give it a meaning which would make the gifts valid, having regard to the rule against perpetuities. But this, I think, I am not at liberty

(1) [1910] 1 I. R. at p. 35. (2) [1903] 1 I. R. at p. 488.

Wylie, J., for M. R. 1911.

TAYLOR *v.* BLAKE.

to do. The rule against perpetuities is, like the rule in *Shelley's Case* (1), a rule of law and not of construction; and, as stated by James, L.J., in *Stuart* v. *Cockerell* (2): "We have to construe this will according to the natural meaning of the words in the same way as if no rule against perpetuities existed." Assuming therefore, as I have already decided, that the testator meant the property to go on the death of the husband or wife of any deceased child to the issue of such child living at the death of such husband or wife, does that devise violate the rule against perpetuities? Any of the children of the testator might marry a person who was not born until after the death of the testator, and such person might not die within twenty-one years after the death of such child, and therefore the persons to take under the devise might not be ascertained within the limits of the rule. This very case has practically been decided by Farwell, J., in *Page* v. *Page* (3). In his judgment he says: "The question in this case is, whether the ultimate gift, having regard to the power of appointment, is or is not void for perpetuity. There is in the first instance a limitation, putting it quite shortly, to a married niece and her children, if any, and then there are limitations to three unmarried nieces and their children, with a power to the nieces to appoint to any husband whom they may marry and who may survive them for a life interest or any less interest. Those husbands of course would not necessarily be born in the testatrix's lifetime; if, therefore, there had been, not a power to appoint to such husbands, but in each case an actual life interest given to such husbands, and the class of children to take was not to be ascertained until the death of the survivor of such niece and her husband, the gift to the class would be void for perpetuity, because the class would not be necessarily ascertainable within a life or lives in being, and twenty-one years afterwards." In *Blight* v. *Hartnell* (4) Fry, J., says: "The rule against perpetuities requires, in my view, the ascertainment within the period, not only of the extreme limits of the class of persons who may take, but of the very persons who are to take, and that because the rule is aimed

(1) 1 Co. 93, b.
(2) L. R. 5 Ch. 715.
(3) [1905] 1 Ch. 376.
(4) 19 Ch. D. 300.

at the practical object of telling who can deal with the property, and if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up." That being the law, you have in this case a limitation to each child for life, remainder to the husband or wife of such child (who may be possibly unborn at the testator's death) for life, remainder to the issue then living of such child absolutely. The persons constituting "the issue then living" might not therefore be ascertainable within twenty-one years after the death of such child, and the final remainder is therefore void; and of course the limitation over in case of no such issue is also void for the same reason. It follows therefore that the only valid dispositions of the residue are the life interest of the children and of their surviving husbands or wives, if any, and the rest is undisposed of.

Solicitor for the trustees: *A. Tuthill.*
Solicitor for other parties: *W. V. Seddall.*
Solicitor for the defendant Basil Kidd: *A. Tuthill.*

W. L.

Barton, J.
1911.

June 26, 27.
July 12.

In re TEMPLE and LYONS'S CONTRACT; and the VENDOR and PURCHASER ACT, 1874.

(1911. No. 417.)

Vendor and purchaser—Fee-farm grant—Land Law (Ireland) Acts—Redemption of Rent Act, 1891—Fixing of fair rent—Realty or personalty.

T., being *sui juris*, and being absolutely entitled to the grantee's interest under a perpetuity grant, served an originating notice under the Redemption of Rent (Ireland) Act, 1891, in pursuance of which a fair rent was fixed by the Irish Land Commission upon the lands. He afterwards died intestate.

Held, that T.'s interest in the land became on the fixing of the fair rent, and was at his death personal estate.

Vendor and Purchaser Summons.

This was an application on the part of Charles Temple of Mullanahinch, county Monaghan, the vendor, for an order declaring that the vendor as heir-at-law of John Temple, deceased —who was assignee of the grantee of the premises granted by a perpetuity grant of 1st February, 1875, and on which said premises the said John Temple had had a fair rent fixed under the provisions of the Redemption of Rent Act, 1891, by order of the Irish Land Commissioners, dated 13th July, 1907—could make good title to the said premises to the purchaser without the concurrence of, or a conveyance from, the personal representative of the said John Temple, deceased. On the 2nd March, 1911, the vendor put up for sale by public auction certain lands in Kilnahalter and Mullinahinch, county Monaghan, containing 25A. 32P. statute measure; and said lands were then purchased by Mr. James Alexander Lyons for £2,150. The title to the said lands commenced with a grant in perpetuity dated 1st February, 1875, made by Rev. Hope Masterton Waddell to Susan M'Adam, whose interest subsequently became vested in John Temple. The said John Temple, on September 26th, 1904, served an originating notice under the Redemption of Rent (Ireland) Act, 1891, for the fixing of a fair rent upon the lands comprised in this grant, and by

order of the Land Commission, dated July 13th, 1907, the reserved rent of £34 14*s.* 11*d.* was reduced to £25 4*s.* On behalf of the purchaser a requisition was furnished to the vendor, requiring the personal representative of John Temple, deceased, to join in the conveyance; but the vendor, who was personal representative as well as heir-at-law, refused to comply.

Calvert, for the vendor:—

There has been no conversion of the fee-simple estate into personalty. The Redemption of Rent Act only deems the fee-farm grantee to be a tenant from year to year for the purpose of having a fair rent fixed; for every other purpose, the fee-simple estate still exists. Nothing has occurred which could take the fee-simple estate out of the fee-farm grantee. The fee-simple estate still exists as regards the liability for tithe rentcharge: *Irish Land Commission* v. *Brown* (1); *Irish Land Commission* v. *Magorian* (2); and there is no reason why it should not exist for the purposes of devolution. The decision in *Ledwith* v. *Ross* (3) is right, and should be followed.

Littledale, K.C., for the purchaser:—

The decision in *De Vesci* v. *O'Connell* (4) does not alter or extend the law as laid down in *Hill* v. *East and West India Dock Co.* (5) and *Ex parte Walton*; *In re Levy* (6), which were cited and relied upon in *Irish Land Commission* v. *Brown* (1). No injury or injustice is done here. The interests of the heir-at-law cannot influence the Court. *Nemo est hæres viventis. In re Ruttledge's Estate* (7) is not an authority against the proposition that by voluntarily fixing a fair rent under section 1 of the Redemption of Rent Act, 1891, John Temple, fee-farm grantee, who was predecessor in title of the vendor, altered the quality of his estate or interest in the lands. The interests of third parties are in no way damnified here. The decision in *Ruttledge's Estate* (7) (see *per* Madden, J., at p. 456, in *Irish Land Commission* v. *Magorian* (2)) is not inconsistent with that of Porter, M.R., in *M'Evoy* v. *M'Evoy* (8)

(1) [1904] 2 I. R. 200.
(2) [1901] 2 I. R. 445.
(3) [1910] 1 I. R. 151.
(4) [1908] A. C. 298.
(5) 9 App. Cas. 448.
(6) 17 Ch. D. 746.
(7) [1895] 1 I. R. 328.
(8) [1897] 1 I. R. 295.

Barton, J. 1911.

In re TEMPLE AND LYONS'S CONTRACT.

in which *In re Ruttledge's Estate* (1) was cited. The decisions of the Vice-Chancellor in *In re Gray*; *Gray* v. *Gray* (2) and *In re Parke*; *Munster Bank* v. *Parke* (3), and of the Master of the Rolls in *M'Evoy* v. *M'Evoy* (4), have been considered as settling the practice in the Chancery Division. No estate of inheritance remains in the grantee of the fee-farm grant after a fair rent has been fixed: *Irish Land Commission* v. *Holmes* (5). The point raised in this case has not yet been determined by the Court of Appeal, having been expressly kept open in *Glenny* v. *Bell* (6) and in *Irish Land Commission* v. *Brown* (7). In *Carrickfergus Urban District Council* v. *Martin* (8), Gibson, J., considers the authorities bearing upon both sides of the question. The facts in *Ledwith* v. *Ross* (9) are quite different from the facts here. This is a simple case upon all fours with the cases decided by the Vice-Chancellor, and followed by the Master of the Rolls. John Temple voluntarily took a course which a dozen years earlier had been held to alter the nature of such an interest in the lands as he then had. No third party is injured. If he had desired to benefit Charles Temple alone, and to defeat the expectations of other persons who might hope to acquire an interest in the lands upon his decease intestate, he could have done so. The tithe rentcharge cases have not any bearing upon the present case. Liability to tithe rentcharge remains as an incident, although the quality of the estate has been changed. The legal personal representative should join as required by the purchaser.

July 12.

BARTON, J.:—

In this case John Temple, a perpetuity grantee of lands, got a fair rent fixed, and afterwards died intestate. John Temple was absolutely entitled to the grantee's interest in the lands, and was *sui juris*. The question is whether, at his death, his interest in the lands upon which the fair rent was fixed was real estate or personal estate.

(1) [1895] 1 I. R. 328.
(2) [1894] 1 I. R. 65.
(3) 1 Ir. W. Rep. 168.
(4) [1897] 1 I. R. 295.
(5) 32 I. L. T. R. 88.
(6) [1898] 2 I. R. 233.
(7) [1904] 2 I. R. 200.
(8) [1906] 2 I. R. 79.
(9) [1910] 1 I. R. 151.

The relevant statutory provisions are section 1 of the Redemption of Rent (Ireland) Act, 1891, and section 21 of the Land Law (Ireland) Act, 1881, as modified by section 1 of the Land Law (Ireland) Act, 1887. The effect of these sections is that, when the perpetuity grantee got the fair rent fixed, he was thenceforward to be deemed to be a tenant of a present ordinary tenancy from year to year, at the rent and subject to the conditions of the grant, so far as such conditions were applicable to a tenancy from year to year, and were not inconsistent with the statutory conditions.

I am of opinion that John Temple's interest in the lands became, upon the fixing of the fair rent, and was at the date of his death personal estate.

The argument on behalf of the heir-at-law has been put in two ways. In the first place, it has been said that these sections of the Irish Land Code operate only, or, at all events, primarily, *as between landlord and tenant*. That is true. But what else is necessary in order to convert the interest of a tenant or occupier of land into personal estate than to bring about, *as between the tenant and his landlord*, the relation of tenant from year to year? Once it has been ascertained that an intestate had at the date of his death been in occupation of lands under circumstances which created, *as between him and his landlord*, the relation of yearly tenant, nothing more is necessary to settle any dispute over the lands between his heir and his personal representative. The devolution of a tenant's interest usually depends upon the contractual relation existing between him and his landlord, and sometimes changes when that relation is modified. The question remains whether the heir of the person who got the fair rent fixed has any equity for re-conversion, or any right to ask the Court to interfere for the purpose of preventing a change in the right of succession to the property. It is difficult to see how he could have any such right or equity, having regard to the fact that the person who got the fair rent fixed was an absolute owner and was *sui juris*.

In the case of lunatics and other persons under disability, when the Court has, from time to time, interfered to prevent a change in the right of succession to the property, the Judges have sometimes been careful to say that they did so, not out of favour to one representative, whether real or personal, over another, but

Barton, J. 1911. *In re* TEMPLE AND LYONS'S CONTRACT.

for reasons arising out of the owner's disability. Again, in cases where parties have limited or defeasible interests, difficult questions sometimes arise as to the capacity of parties to effect a conversion or re-conversion. Whether these cases have any, and, if so, what, application to the fixing of a fair rent under the Land Acts, is a matter to be dealt with, if the question ever arises. No authority has been cited for showing favour to the heir-at-law of a person who, being an absolute owner and *sui juris*, has done an act which had the effect of converting, as between himself and his landlord, his interest in land into a tenancy from year to year.

The argument for the heir-at-law has also been put in another way. It was said that a "deeming" section of this kind is not to be construed so as to injuriously affect third parties who were not within the purview of the statute. That is a well-settled principle, illustrated by *Gover's Case* (1); *Ex parte Walton* (2); *Hill's Case* (3); and *O'Connell* v. *De Vesci* (4). More than one Judge has, however, expressed the opinion that the tenant *and his estate* (which includes his heir) is within the purview of the statute. None of the cases have gone so far as to decide that the heir of an absolute owner is a "third party" within the meaning of that well-settled rule. If a complaint came from a mortgagee, chargeant, jointress, dowress, superior landlord, remainderman, or other third person with some bargain or right of property affecting the tenant or the lands, it might have to be weighed and considered. But the heir of an absolute owner must, as a general rule, abide the consequences of the absolute owner's acts, whether those acts take the form of alienation, testamentary disposition, or conversion by contract of sale, or by act or contract creating a chattel tenure.

The argument for the heir-at-law went very far. It was contended not merely that the heir had some right or equity which was peculiar to himself, to repair or compensate him for his disappointed expectations; counsel was driven to contend that the tenant's interest in these lands (which, as between the tenant and his landlord, will always be a yearly tenancy) will, *in perpetuum*, or so long as it lasts, devolve and pass as real estate. That seems to be

(1) 1 Ch. D. 182.
(2) 17 Ch. D. 746.
(3) 9 App. Cas. 448.
(4) [1908] A. C. 298.

a large result to follow from the disappointed expectations of an heir.

The authorities contain conflicting opinions. Some of them are distinguishable from the present case. For example, *Ledwith* v. *Ross* (1) was a case of an estate *pur autre vie* limited to heirs, and the Court had to deal with special facts, and to construe a will under which the person who got the fair rent fixed was not an absolute owner, but a tenant for life.

Reference has been made to some apparent differences of judicial opinion; but the conflict appears to have been not so much in the decisions themselves as in the reasons given for the decisions. Madden, J., in *Magorian's Case* (2) expressed the opinion that the decision in *In re Ruttledge's Estate* (3), as distinguished from the grounds of the decision, is reconcilable with the decision in *M'Evoy* v. *M'Evoy* (4); and the latter case was approved by Holmes, L.J., in *Glenny* v. *Bell* (5), and has, for more than twelve years, been followed by the Judges, and acted on by the conveyancing counsel in the Chancery Division. It was stated at the Bar that the same view has been acted on in the profession, and has been the basis of many sales and titles. I doubt whether I am not bound by authority to hold that this interest in land was personal estate; but as the authorities are not quite harmonious, I have felt bound to consider the question on principle; and, on principle, it appears to me that John Temple's interest was, at his death, personal estate.

Solicitor for the vendor: *J. Forster Dunwoody.*
Solicitor for the purchaser: *Hoey & Denning.*

W. M'G.

(1) [1910] 1 I. R. 151.
(2) [1901] 2 I. R. 445, at p. 456. [1895] 1 I. R. 328.
(4) [1897] 1 I. R. 295.
(5) [1898] 2 I. R. 233, at p. 246.

Wylie, J.
1911.
Nov. 14, 15, 20.

In the MATTER of the ESTATE of BURTON W. PERSSE.

Land Purchase Acts—Purchase-money of lands sold paid out—Miscarriage—Jurisdiction of Land Commission to order re-lodgment.

Where the purchase-money of lands sold under the Land Purchase Acts has been paid out to any person through a miscarriage, the Court has jurisdiction to order the person to whom the money has been so paid to re-lodge the same in Court.

In re Gage's Estate (17 L. R. Ir. 111) applied.

Motion by the Commissioners of Charitable Donations and Bequests that the vendor be directed to re-lodge in Court the redemption-price of a charitable annuity of £25 charged on the lands sold in this matter, and arrears of said annuity, and costs.

Under the will of Parsons Persse, who died in 1814, the lands of Ballinruane and Granna were devised as therein mentioned, subject as to the said lands of Ballinruane to a charitable annuity of £25, which by a decree in Chancery made in 1842 was declared well charged on said lands.

In 1891 the vendor succeeded to the estate comprising the lands so devised. He paid said annuity up to 1905, but subsequently declined to continue payment thereof, alleging that the lands of Ballinruane, charged with said annuity, were other lands of the same name in the neighbourhood of the estate then in the possession of Captain Persse.

Early in 1906 the vendor lodged an originating request for the sale of the estate under the Land Purchase Acts. In the originating request, and on the sale-map lodged therewith, the lands for sale were described as Granna, East and West, and part of Monneen. The abstract of title lodged commenced with a conveyance, dated the 22nd April, 1852, wherein the lands were described as Ballinruane and East and West Granna; and in all the title-deeds abstracted the lands were similarly described. The

Examiner required evidence of identity of the lands sold with the lands to which title was shown. Two affidavits were filed in order to satisfy the requisition, which were, in fact, though not intentionally, misleading. In the final notice to claimants the lands were set out under the description in the originating request. In April, 1907, the purchase-money was allocated, and the residue, amounting to upwards of £3000, was paid out to the vendor.

The Commissioners of Charitable Donations and Bequests were unaware that the proceedings for sale were pending affecting the lands of Ballinruane, and in 1908 instituted an action in the Chancery Division to have it declared that the annuity was well charged on said lands, naming Captain Persse and the vendor as defendants, but, on subsequently learning that said lands had been sold, had taken no further steps in the action.

The arguments chiefly turned on the question of whether the lands of Ballinruane were identical with portion of the lands sold in the matter?

The Attorney-General (*Right Hon. C. A. O'Connor, K.C.*), and *T. Henry Maxwell*, for the Commissioners of Charitable Donations and Bequests:—

The Court has power to undo everything on the final schedule of incumbrances for the purpose of rectifying a miscarriage: Sect. 39 of the Landed Estates Court Act Rules of the 26th October, 1896, Rule 2; and has jurisdiction to order purchase-money wrongfully paid out to be re-lodged in Court: *In re Grier's Estate* (1); *In re Innes' Estate* (2); *Brennan* v. *Horan* (3).

W. M. Jellett, K.C., and *H. Morgan Byrne*, for the vendor:—

The question of what lands are subject to the annuity can now only be tried in the Chancery action. The order paying out the residue to the vendor was a judicial act, and cannot now be undone. There is no implied undertaking, as in *In re Innes' Estate* (2). There is no jurisdiction to order the money to be re-lodged. In *Beattie* v. *Cordner* (4), at page 15, FitzGibbon, L.J., says:—" There is a distinction between following and getting

(1) 1 Ir. R. 6 Eq. 1.
(2) 40 Ir. L. T. R. 214.
(3) 43 Ir. L. T. R. 136.
(4) [1903] 1 Ir. R. 1.

Wylie, J. 1911.

In re Persse's Estate.

Nov. 20.

back money which has been paid out, and allowing a creditor to claim, out of time, against assets not yet distributed." See also *Harrison* v. *Kirk* (1) and *Wellwood* v. *Grady* (2).

Wylie, J. :—

In this case the residue of the purchase-money has been paid out to the vendor, and the Commissioners of Charitable Donations and Bequests claim that they are entitled to have a sufficient amount brought back into Court to satisfy their claim. It has been contended that the lands of Ballinruane, subject to their annuity, were not part of the lands sold in this matter, and counsel for the vendor suggest that this is a question which I cannot try, and that it can only be tried in the Chancery Division. Now, what is the claim of the Commissioners? They ask me to decide whether their claim in respect of the annuity of £25 was a valid claim on the purchase-money of the estate which has been sold through the Land Commission? If the matter had been brought to the notice of the Commissioners at the proper time, they would have filed an objection, and the question would have been decided by me on the ruling of the final schedule. The Commissioners had not an opportunity of doing so, as they had no notice of the proceedings for sale. I hold that I have now jurisdiction to try the question of the validity of their claim. [His Lordship referred to the various documents of title for the purpose of showing that the lands of Ballinruane formed part of the lands sold in the matter, and continued:] I have no doubt that the lands of Ballinruane charged with the annuity of £25 which are mentioned in all these title-deeds are part of the lands which have been sold. That being so, what is now the proper course to take?

The practice and jurisdiction to order money to be brought back have been laid down in *In re Gage's Estate* (3). In that case, a rentcharge in lieu of tithes was purchased by the owner of the lands, and an order had been made charging the instalments of purchase-money on these lands. The lands were sold in the Land Judge's Court. The owner became purchaser of a considerable portion of his own estate. After discharging all the claims of all other incumbrancers, except that of the Irish Land

(1) [1904] A. C. 1. (2) [1904] 1 Ir. R. 388. (3) 17 L. R. Ir. 111.

Commission for instalments of their purchase-money, there remained as coming to the owner a sum of £8000. Without making any provision for payment of these instalments, absolute credit was given to Mr. Gage for the full sum of £8000 as against his purchase-money. At p. 116 Monroe, J., says:—"If the lands have been sold, and thereby discharged from their incumbrances, the Irish Land Commission seek to be paid the amount or value of that incumbrance. They have received nothing, and the fund is gone. It was provided by the conditions of sale that these instalments should be bought up out of the purchase-money; but this has not been done. It is manifest that Mr. Gage is the person who has got the Land Commission's money; although the sum was not paid out to him, he got absolute credit for it, which amounts to the same thing. If money has been wrongfully paid out to any person, the Court can exercise full jurisdiction to make him bring it back, and I must therefore order that, within two months from the service of this order, Mr. Gage shall lodge in Court a sum sufficient to redeem the remaining instalments of the purchase-money of tithe rentcharge." And later on, at p. 117, he says—"When the carriage of proceedings is entrusted to the care of any solicitor, it is his duty to see that no funds lodged to the credit of the cause are to be paid to any but the proper parties, or drawn out of Court except in conformity with the rules laid down for the guidance of solicitors."

On that authority, as the money has been paid out through a miscarriage, I hold that I have jurisdiction to order it to be re-lodged in Court.

Accordingly, I can adopt either of two courses. I can decide the question on the present notice of motion, or I can discharge the order for payment out of the residue to the vendor, and direct him to re-lodge it in Court, and then, when an objection has been filed, I can formally rule the matter.

Solicitors for the Commissioners of Charitable Donations and Bequests: *Maxwell, Weldon, & Co.*

Solicitors for the vendor: *Lambert & Warren.*

J. E. W.

Wylie, J.
1911.
Nov. 23, 28.

In the MATTER of the ESTATE of MICHAEL W. BREW.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Bonus—Sale by person giving* prima facie *evidence of title to sell within s.* 17, *but eventually proving to have no power to sell—To whom payable?*

Though a person may sell land under the Land Purchase Acts with the utmost *bona fides* and the strongest *prima facie* evidence of title, he cannot be entitled to the bonus as a vendor, if, at the time of sale, he had no sufficient interest in the land to give him a power to sell. In such a case the bonus must be paid to the person who is eventually proved to be the person who had the power to sell.

Question arising on allocation as to who was entitled to the bonus payable under section 48 of the Irish Land Act, 1903? The circumstances under which the question arose, as stated in the judgment of Wylie, J., were as follows:—"A suit had been brought in Mr. Justice Barton's Court to administer the real and personal estate of Thomas Foley Brew, deceased, and in that suit a receiver had been appointed over such real estate. An application was afterwards made on behalf of Marion B. Lynch, who claimed to be entitled to a portion of the real estate, to have the receiver discharged with reference to such portion, and an order was made accordingly. Marion B. Lynch then entered into possession of said portion, and in 1909 lodged an originating request for sale thereof to the Land Commission. The lands were duly declared an estate, and bought by the Estates Commissioners for £2,400, and in respect thereof a bonus of £288 was payable. The vendor, when she obtained the order discharging the receiver, appeared to have satisfied Mr. Justice Barton, and all parties, and the counsel engaged in that case, as to her title to the lands. She also satisfied her certifying counsel and the Estates Commissioners as to her *prima facie* right to sell under the Land Purchase Acts, but on further investigation of title, for the purpose of distribution of the purchase-money, another claimant appeared in Michael W. Brew, and the question of title having been argued before Wylie, J., it was held that Michael W. Brew was the real owner, and not

Marion B. Lynch." It was admitted that the residue of the purchase-money should be transferred to the credit of the Chancery action. Marion B. Lynch had since died, and the bonus was now claimed by her personal representative on the ground that she was the actual vendor. It was also claimed by Michael W. Brew on the ground that he was the real owner, and the only person who had power to sell.

James Comyn, for Michael W. Brew.

J. Donaldson, for the personal representative of Marion B. Lynch.

Michael Comyn, for the personal representatives of Thomas Foley Brew.

WYLIE, J.:— Nov. 28

In this case a question, with reference to the right to the bonus, has arisen under rather peculiar circumstances. [His Lordship stated the facts as above set out, and continued]—Marion B. Lynch, as actual vendor, or rather her personal representative, now claims the bonus, and Michael W. Brew, as the real owner, and the only person who had power to sell, claims it also.

If I have not already decided this point, I must do so now, and it seems to me that, though a person may sell land under the Land Purchase Acts with the utmost *bona fides* and the strongest *prima facie* evidence of title, he cannot be entitled to the bonus as a vendor, if at the time of sale he had no sufficient interest in the land to give him a power to sell, and I think, in such a case, the bonus must be paid to the person who is eventually proved to be the person who had the power to sell. This, I think, is also just, because as he is compelled to adopt the sale, he is fairly entitled to any benefit accruing. The vendor must be treated as his agent for the purposes of the sale.

Solicitor for Michael W. Brew: *M. Killeen.*

Solicitor for the representative of Marion B. Lynch: *M. C. O'Halloran.*

Solicitors for the representatives of Thomas Foley Brew: *Lynch & Lynch.*

J. E. W.

M. R. 1911. Oct. 31.

In the MATTER of the COMPANIES CONSOLIDATION ACT, 1908, and in the MATTER of JOHN CLARKE & CO., Limited (in liquidation).

(1911. Nos. 521 & 721.)

Company—Arrangement—Voluntary liquidation—Sanction of the Court—Companies Consolidation Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120—*Practice—Form of order.*

When it is desired to obtain the sanction of the Court to a scheme of arrangement under section 120 of the Companies Consolidation Act, 1908, the practice is to obtain upon originating summons an order convening the requisite meeting or meetings to consider the scheme; if the necessary majority is obtained, the sanction of the Court may then be sought on petition. Form of order, in the case of a company in voluntary liquidation, sanctioning a composition with creditors.

Petition.

This was an application on behalf of Matilda R. Clarke, widow, a member of the above-named company, that a scheme of arrangement might be sanctioned by the Court pursuant to section 120 of the Companies Act, 1908.

The material facts, as stated in the petition and affidavits, were as follows:—

1. The company was incorporated as a joint-stock company on the 1st day of January, 1887. The object of the company (amongst others) was to carry on the business of drysalters, druggists, general grocers, oilmen, seedsmen, manufacturers of biscuits, confectionery, jam, &c., as more fully set forth and described in the memorandum and articles of association of the company. The capital of the company was fixed by the memorandum and articles of association at the sum of £40,000, divided into 4000 shares of £10 each. The entire 4000 shares were issued, and £8 paid up on foot of each such share, leaving a call of £2 per share still unpaid.

The company carried on business from the date of incorporation down till April, 1911.

During the first decade of the company's business the undertaking was entirely successful, but in recent times, and in particular in the last ten years, owing to the keenness of competition and the depletion of the rural population of Ireland, the profits of the business were greatly diminished, and no dividends had been paid on foot of the shares for the past ten years, the last dividend being declared on the 23rd April, 1904, in respect of the year ending the 26th December, 1903, at the rate of 3½ per cent. per annum.

In or about the year 1906 the company found itself pressed for money, and the bankers of the company, the Ulster Banking Company, Limited, refused to make further advances to the company, except upon the condition that the company should secure any such advances by the issue to the Bank of debentures secured upon the undertaking of the company. Accordingly, the company, by a resolution dated 3rd October, 1906, issued to the Ulster Banking Company, Limited, twenty debentures of £500 each, carrying interest at the rate of £5 per cent. per annum. There was no other charge on the company's property or undertaking. The issue of these debentures to the Bank resulted in the credit of the company being greatly restricted, and its operations hampered, and finally under pressure of several creditors the company found itself no longer able to continue business, and accordingly, at an extraordinary general meeting of the company, held on 1st April, 1911, a resolution was passed that the company be wound up voluntarily, and that Mr. Robert Walsh, of High Street, Belfast, be appointed liquidator for the purposes of the winding-up. Mr. Robert Walsh, as liquidator, convened the usual statutory meeting of creditors of the company, which was held at Belfast on the 20th April, 1911, at which meeting he presented a balance-sheet showing the state of the company's affairs, and his appointment as liquidator was confirmed, and at the same time a committee of creditors was appointed to act with him in the interests of the general body of unsecured creditors in the winding-up.

The petitioner, under the provisions of section 120 of the

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Companies Consolidation Act, 1908, acting on her own behalf, and on behalf of the ordinary shareholders of the company, issued a circular, dated 6th June, 1911, when the following offer of arrangement was put before the creditors with a view of obtaining their approval, viz., that the debenture-holders should be paid the full amount due on foot of their debentures, and that a composition of 10*s.* in the £ be paid by the company on foot of its unsecured debts and engagements in four equal instalments, payable in three, six, eight, and twelve months respectively, from the date on which the scheme of arrangement should be sanctioned by the Court, the last instalment to be secured by the promissory notes of the said Matilda R. Clarke and Dr. George Clarke, the shareholder-depositors not to receive any dividends on their debts until the other unsecured creditors had been paid their respective compositions of 10*s.* in the £ in full, and that the estate should remain vested in the liquidator until the composition had been fully paid up.

A large body of unsecured creditors having expressed their approval of the proposed scheme of arrangement, the petitioner applied by originating summons in this matter, dated 28th June, 1911, for an order that Robert Walsh, the said liquidator, should be directed to convene separate meetings of the debenture-holders, contributories, and unsecured creditors of the company, in order that the said scheme of arrangement, or some modification thereof, might be considered, and, if thought fit, approved of by the said meetings.

By an order of the Master of the Rolls made upon the hearing of the said summons, and dated 18th July, 1911, it was ordered that the said liquidator should forthwith convene separate meetings of (1) the debenture-holders, (2) the unsecured creditors, and (3) the contributories, to be held on the 17th August, 1911, in the Chamber of Commerce, Belfast, for the purpose of considering, and, if thought fit, approving, with or without modification, of a scheme of arrangement proposed to be made between the said company and its debenture-holders, unsecured creditors, and contributories, and it was ordered that the said liquidator cause to be published once in the *Belfast News-Letter* and once in the *Northern Whig* newspaper, at least seven

clear days before the day appointed for holding the said meetings, an advertisement convening the said meetings, and stating that a copy of the said scheme could be seen at the offices of the said liquidator, and that he send to each of the debenture-holders, creditors, and contributories, by prepaid post, at least seven days before the date of the said meetings, stamped forms of proxy, and that the said meetings be conducted as ordinary meetings of the company, and that the liquidator preside as chairman at each of the said meetings, and report the result thereof to the Court within a reasonable time.

After the said order had been made, and a conference with the said committee of unsecured creditors appointed to act with the liquidator had been held, it was arranged that the said offer contained in the said scheme of arrangement should be modified to meet the views of a number of the large creditors, and, accordingly, a modified scheme of arrangement in the following form was submitted to the meetings of debenture-holders, contributories, and unsecured creditors, in lieu of the other proposed and hereinbefore set forth, viz., that, after payment of the debentures in full, the unsecured creditors of the company, other than the shareholder-depositors, should first receive a composition of 12*s.* 6*d.* in the £, upon the amount of their debts, payable in such instalments as the liquidator might find convenient, having regard to the realization of the estate, and that after the unsecured creditors had received the said composition of 12*s.* 6*d.* in the £ the shareholder-depositors should be entitled to rank next for 12*s.* 6*d.* in the £, upon the amounts due to them, and that if any balance remained after the payment of the debentures in full and the above compositions, the balance, if any, should be distributed *pro rata* amongst the unsecured creditors and the shareholder-depositors, in proportion to the amount of their debts, and that the liquidator should be directed, in any event, to waive any calls due upon foot of any shares issued. In pursuance of the said order the liquidator duly convened the said meetings in the manner and at the times directed by the said order. The meeting of the debenture-holders was duly held on the 17th August, 1911, and was attended by Mr. C. S. Hardman as proxy for the Ulster Banking Company, Limited, the sole debenture-holders in the company, and the modified offer above mentioned was submitted

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to the meeting, when Mr. Hardman stated that the debenture-holders, having been paid the full amount due to them for principal and interest on foot of the said debentures, had no objection to the modified proposal being adopted.

The meeting of the contributories was duly held on the same day, and was attended either personally, or by proxy, by five contributories (the petitioner, Dr. George Clarke, Margaret Clarke, Mary Clarke, and John Clarke), representing 3250 shares in the company, when the modified offer was unanimously adopted.

The meeting of the unsecured creditors of the company was also duly held on the same day, and was attended by 314 creditors, either personally, or by proxy, whose proofs were admitted for voting purposes to the value of £21,531 16*s.* 1*d.*, the total indebtedness of the company being £35,280 8*s.*, or thereabouts. The said creditors included four of the contributories above named and Edith Dickson, a member of the Clarke family, to whom the company was indebted in the following sums:—the petitioner, £5508 12*s.* 8*d.*; George Clarke, £3072 15*s.* 11*d.*; Margaret Clarke, £425; Mary Clarke, £453; Edith Dickson, £690 11*s.* 3*d.*—making in all £10,122 19*s.* 10*d.*—in respect of moneys deposited by them with the company, and who are referred to, as the shareholder-depositors. The question was then submitted to the meeting, whether the unsecured creditors of the company approved of the new modified proposal as above set forth, which was then and there read to all the creditors who were present, by the chairman of the meeting. Creditors then present, either personally or by proxy, to the number of 285, and representing a total indebtedness of £19,028 9*s.* 11*d.*, voted in favour of the said proposal; and creditors then present, either personally or by proxy, to the number of twenty-nine, and representing in value £2503 10*s.* 2*d.*, voted against the said proposal, there being a majority both in number and value in support of the said scheme of arrangement very largely in excess of that required by the statute to carry the said proposal.

The liquidator filed his reports of the said meetings of the debenture-holders, contributories, and unsecured creditors, respectively.

The petitioner stated that, save as aforesaid, no objection had been made to the carrying out of the said arrangement, and that it would, in her judgment, operate greatly for the benefit of all the creditors and shareholders of the company that the said arrangement should be sanctioned by the Court and carried out, and that the creditors of the company had as aforesaid approved of it by a majority greatly in excess of the statutory requirements.

The prayer of the petition was as follows:—

1. That the said scheme of arrangement hereinbefore stated, and agreed to by the necessary majority of the unsecured creditors of the said company, and by the debenture-holders and shareholders of the said company as aforesaid, may be sanctioned and confirmed by an order of this honourable Court, so as to be binding on all the creditors, both secured and unsecured, of the said company, and that this honourable Court do order that the said scheme of arrangement be carried into effect.

2. Or that such further or other order may be made in the premises as shall seem meet.

3. For the costs of your petitioner when taxed and ascertained.

It appeared from the statement of affairs as of August 1st, 1911, that the liabilities were estimated at £35,280 8*s.*; assets, £28,757 10*s.* 9*d.*; deficiency, £6522 17*s.* 3*d.* It further appeared that a dissentient creditor for £413 0*s.* 10*d.* had since the date of the meeting withdrawn his opposition, which made the number of creditors in favour of the arrangement 286, and 28 against it, and the debts due to the creditors in favour of the arrangement £19,441 10*s.* 9*d.*, or £9,318 10*s.* 11*d.*, excluding the £10,122 19*s.* 10*d.* due to the members of the Clarke family, while the sums due to the dissenting creditors amounted to £2,090 9*s.* 4*d.*

The petition was presented in the long vacation, and came on for hearing before the Vacation Judge, who by order of 29th September, 1911, transferred it to the Court of the Master of the Rolls.

James Andrews, for the petitioner:—

The practice in England, under section 20 of the Companies Act, 1908, in a case of this kind is to obtain, upon originating

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summons, an order convening the necessary meetings to consider the scheme, and after the report of the meetings has been filed, to apply on petition for the sanction of the Court to the scheme: Simonson on Reconstruction and Amalgamation of Companies. That course has been adopted here, there being no settled practice in Ireland.

Matheson, K.C., and *J. M. Whitaker*, for the liquidator.

A representative of H. Nickel & Co., creditors for £65 8*s.* 6*d.*, who had voted against the arrangement at the meeting, appeared and consented to the arrangement.

The Master of the Rolls said that the English practice was a convenient practice, and that he would follow it, and made the following order:—

The petition preferred unto this Court on the 28th day of September, 1911, by Matilda R. Clarke—coming on to be heard this day before this Court in the presence of counsel for the said petitioner and counsel for Robert Walsh, the liquidator of John Clarke & Co., Limited, in the title hereof mentioned, and counsel for the said Matilda R. Clarke further applying pursuant to summons dated the twenty-sixth day of June, one thousand nine hundred and eleven, on reading the said petition and the order for hearing thereon and the order dated the 29th day of September, 1911, transferring the said petition into this Court and the said summons and the order dated the eighteenth day of July, one thousand nine hundred and eleven, whereby the said liquidator was ordered to convene separate meetings of the debenture-holders, the unsecured creditors, and the contributories of John Clarke & Co., Limited, for the purpose of considering, and, if thought fit, approving, with or without modification, a scheme of arrangement proposed to be made between the said Company and its debenture stock-holders, unsecured creditors, and contributories; and the *Belfast News-Letter* of the 7th day of August, 1911, and *The Northern Whig* newspaper, dated the 5th day of August, one thousand nine hundred and eleven, each containing an advertisement of the notices convening the said meetings directed to be held by the said order, and the reports of the said liquidator of the proceedings at the said several meetings, and the affidavit of the said liquidator Robert Walsh, filed on the fourteenth day of September, one thousand nine hundred and eleven, verifying the said reports, and the affidavit of David Gordon Dickson, filed on the twenty-sixth day of October, one thousand nine hundred and eleven, and the affidavit of Frederick M'Comb, filed on the fourteenth day of September, one thousand nine hundred and eleven, and on hearing what was alleged by said counsel respectively, and

Siegwort Dannenberg, representing H. Nickel & Co., creditors of the said Company, attending at the bar and withdrawing opposition and consenting to this order, This Court doth hereby sanction the modified scheme of arrangement as set forth in the eleventh paragraph of the said petition and in the schedule hereto and doth declare the same to be binding on all the creditors, both secured and unsecured, and on the contributories of the said Company, and the Court doth declare the petitioner and the said liquidator entitled to their respective costs of the said petition and of this order, including their costs of the said summons and of the said orders, and proceedings thereunder to be paid when taxed and ascertained out of the assets of the said Company.

SCHEDULE REFERRED TO.

Scheme of arrangement sanctioned by the Court under section 120 of the Companies Consolidation Act, 1908.

After payment of the debentures of John Clarke & Co., Limited, in full, the unsecured creditors of the Company other than the shareholder-depositors shall first receive a composition of 12*s.* 6*d.* in the £ upon the amount of their debts, payable in such instalments as the liquidator may find convenient having regard to the realization of the estate; and after the unsecured creditors have received the said composition of 12*s.* 6*d.*, in the £ the shareholder-depositors shall be entitled to rank next for 12*s.* 6*d.* in the £ upon the respective amounts due to them; and if any balance remains after payment of the said debentures and the above compositions, the balance, if any, shall be distributed *pro rata* amongst the unsecured creditors and the shareholder-depositors in proportion to the amount of their debts, and the liquidator shall in any event waive any calls due upon foot of any shares issued.

Solicitors for the petitioner: *Shean & Dickson.*
Solicitor for the liquidator: *Melville M'Gown.*

W. L.

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Nov. 16, 17, 27. *Assignment of chose in action—Deposit receipt—Transfer of beneficial interest in—Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *sect.* 28 (6).

In order to transfer the beneficial interest in a deposit receipt, a written assignment is unnecessary. It is sufficient if the deposit receipt is surrendered to the bank, and a new deposit receipt taken out, with intent to pass the beneficial interest, in the names of the persons to whom the depositor intends to pass the beneficial interest.

S., the owner of a deposit receipt for £900, surrendered the same to the bank, and directed a new deposit receipt to be made out in the names of himself and his two nephews, with the intention that the interest in the same should at his own death pass to his nephews. S. subsequently died.

Held, that there had been an effectual transfer of the beneficial interest, and that at the death of A. the same passed to the two nephews.

TRIAL OF ACTION.

The facts are fully stated in the judgment of Ross, J. The action, which was brought by the plaintiff, suing as the administrator of Nicholas Shevlin, deceased, claimed (1) a declaration that the defendants, Thomas Shevlin and Joseph Shevlin, held as trustees for the plaintiff a deposit for £900 with the National Bank, Ltd., at Carrickmacross branch, which, prior to the 7th August, 1909, was in the sole name of Nicholas Shevlin, and was, on the 7th August, 1909, transferred into the names of the said Nicholas Shevlin and the said defendants, and which, subsequently to the death of the said Nicholas Shevlin, was transferred to and now was in the joint names of the said defendants; (2) a declaration that the said sum of £900 and all interest accrued thereon formed part of the estate of the said Nicholas Shevlin; (3) an injunction to prevent the defendants, Thomas Shevlin and Joseph Shevlin, from disposing of, cashing, or otherwise parting with the possession of the said deposit receipt; (4) an injunction to prevent the defendants, the National Bank, Ltd., from cashing the said

deposit receipt, or otherwise parting with the possession and control of the said sum of £900, and the accumulated interest thereon.

The defendants, Thomas Shevlin and Joseph Shevlin, by their defence said that when Nicholas Shevlin transferred the deposit receipt into the names of himself and the said defendants, he did so with the intention of constituting them joint tenants with him of the money on deposit receipt, so that in the event of his predeceasing the defendants same should enure for their benefit as beneficial owners thereof. The defendants further said that Nicholas Shevlin came to reside with them on the 1st April, 1904, and placed himself *in loco parentis* to them, and continued as such till his death on the 11th August, 1909.

S. L. Brown, K.C., Chaytor, K.C., and *Calvert*, for the plaintiff.

Serjeant Moriarty, K.C., T. M. Healy, K.C., and *Vincent Rice*, for the defendants Thomas Shevlin and Joseph Shevlin, referred to *O'Brien* v. *Shiel* (1); *Moore* v. *Uister Bank* (2); *Gason* v. *Rich* (3); *Talbot* v. *Cody* (4); *Diver* v. *M'Crea* (5).

E. S. Murphy, for the defendants, the National Bank, Limited.

Chaytor, K.C., in reply :—

A deposit receipt is merely an ordinary debt : Hart's Law of Banking, p. 537. The alleged transfer here is invalid, because the Judicature Act, sect. 28, sub-sect. 6, requires every absolute assignment of any debt or legal chose in action to be in writing signed by the assignor. The assignment cannot be effected by parol : *Lee* v. *Magrath* (6). A valid equitable assignment cannot be created by parol. *Gurnell* v. *Gardner* (7) only decided that a valid equitable lien could be created by parol. No case of *donatio mortis causa* or of advancement has been made here. The defendant's case is a gift or legal transfer : *Cassidy* v. *Belfast Banking Company* (8).

(1) I. R. 7 Eq. 255.
(2) I. R. 11 C. L. 512.
(3) 19 L. R. Ir. 391.
(4) I. R. 10 Eq. 138.
(5) 42 I. L. T. R. 249.
(6) 10 L. R. Ir. 45.
(7) 9 Jur. (N. S.) 1220.
(8) 2 I. L. T. R. 46.

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Ross, J. :—

This action is brought by the plaintiff, as personal representative of Nicholas Shevlin, to recover a sum of £900 lodged on deposit receipt in the Carrickmacross branch of the National Bank.

Up to the 7th August, 1909, the deposit receipt had been in the sole name of Nicholas Shevlin. On that day a new deposit receipt was taken out in the names of Nicholas Shevlin and the two defendants Thomas and Joseph Shevlin. On the 11th August, 1909, Nicholas Shevlin died. The defendants Thomas and Joseph Shevlin have since the death dealt with the money. The balance, amounting to £600, is now lodged on deposit receipt in their joint names.

Nicholas Shevlin had lived the most of his life in America and England. He returned to Ireland some years ago, and lived with the defendant in a farm-house about two miles from Carrickmacross. He had been married, but his wife had died before his return to Ireland. He had no children. His next-of-kin are the children of his sister, Mrs. Brennan, the children of another sister, Mrs. McEneaney, of whom the plaintiff is one, and the children of his brother, namely, the defendants, Thomas Shevlin, Joseph Shevlin, and their sister, who lived in the house with them. The only other fact of the past history relied on is, that Nicholas Shevlin bought a farm which was subsequently evicted for non-payment of rent. He was afterwards reinstated, and bought out his holding under the Land Purchase Acts. He procured the sale to be made to him and his nephew Joseph Shevlin as joint owners.

On Thursday, 5th August, 1909, Nicholas Shevlin became unwell and sent for a doctor. On Friday morning, 6th August, Dr. McCaul visited him, and found him suffering from a serious affection of the bladder. The doctor indicated to him the dangerous nature of his illness, and suggested that he should settle his affairs. Shevlin replied that there was very little settling to be done, that he was going to leave everything to the people in the house. The doctor had not the surgical instrument he required with him in the morning, and returned later in

the day. In the meantime the bank manager, Mr. Foley, had seen Nicholas Shevlin. When the doctor returned in the evening, Shevlin told him that he had seen the bank manager, and that he had settled his affairs.

The bank manager, Mr. Foley, was sent for on Friday, the 6th August, and went out to see Nicholas Shevlin in the afternoon. The old man had the deposit receipt brought, and instructed him to put it into the names of his nephews, the defendants, Thomas and Joseph. Mr. Foley suggested to him to have his own name put in also, and Shevlin assented. He also signed as a marksman on the back of the deposit receipt. This is, I believe, a usual practice in all banks when a new receipt is being taken out. It is also the custom of banks, when the depositor desires to have the names altered, to have a requisition form signed by the owners of the money deposited. Mr. Foley brought a requisition form with him. It was not signed by Nicholas Shevlin, but on the following morning, Saturday, the 7th, Thomas Shevlin came into the bank, received payment of the interest due, £12 14*s.*, signed the requisition form, and received the new deposit receipt in the three names. Mr. Foley had informed Nicholas Shevlin, when he advised him to leave his name in with the two others, that if anything happened to him the nephews would get the money without any trouble. It is stated that Nicholas directed Thomas to sign his name on the requisition form, and directed Mr. Foley to give the interest to the messenger whom he would send on the following day.

The Roman Catholic Curate, the Rev. Patrick Owen, visited Nicholas on Saturday, the 7th. He asked him if he had settled his affairs. Shevlin replied that the doctor and bank manager had been out, and that all was arranged. In further conversation he said, "Who would I leave what I have to, only to the parties I am stopping with?"

The defendants themselves have given evidence. I cannot say that I disbelieve it; but as their interest in the suit is so great, I do not take it much into account. The plaintiff was called at the end of the defendant's case, and for the same reason I am not inclined to attach much weight to his evidence. The other evidence on behalf of the plaintiff, even if I did believe it, is of

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little importance. It is always easy to find witnesses who will prove conversations with the man who has disposed of his property, indicating that he intended to dispose of it in favour of somebody else, but no person of experience would attach any weight to that class of evidence in a case of this kind.

Now the doctor, the bank manager, and the priest are quite independent witnesses, and their evidence satisfies me that Nicholas Shevlin intended to give the £900 to the defendants, Thomas and Joseph Shevlin. Nicholas Shevlin was clearly of sound mind, and fraud is not pleaded.

It is contended on behalf of the plaintiff that the transaction at most amounted to an incomplete gift, and that equity cannot assist or give it effect for the benefit of volunteers. I had thought that the law as to deposit receipts was well settled. It is, briefly, as follows. If the owner directs a new deposit receipt to be taken out in the names of other persons, there is a resulting trust in favour of the owner, and the other persons are merely trustees for him. The *onus* is upon the other persons to show that the beneficial interest also was intended to pass to them. If, however, the owner stands *in loco parentis* to these other persons, the *onus* is the other way, and an advancement is presumed. It is, however, open to the persons in respect of whom the owner does not occupy the relationship indicated by the phrase *in loco parentis* to prove by contemporaneous declarations, or by other evidence, that the beneficial interest was intended to pass. All that is required is the surrender of the deposit receipt and the reception by the owner of the new deposit receipt in the names of the other parties, or in the names of the owner and other parties. No further writing is necessary. The requisition form is not a legal necessity. It is important to the bank as an authority for the issue of the new deposit receipt. For the first time, so far as I am aware, it has been contended by learned counsel for the plaintiff that under section 28, sub-section 6, of the Judicature Act, the property cannot pass without an absolute assignment in writing under the hand of the assignor.

In the first place, we must observe that the section is consequent upon the fusion of the Courts of Law and the Courts of Equity In equity a chose in action was always assignable, but it was no

before the Act assignable at law, so as to give the assignee the right to sue the debtor in his own name. Subject to certain conditions as to notice, mode of assignment, and liability to prior equities, assignments which before the Act would have been valid are still valid. "The statute," as Lord Macnaghten says, in *Brandt* v. *Dunlop Rubber Company* (1), "does not forbid or destroy equitable assignments, or impair their efficacy in the slightest degree."

Or again, as put by Lord Lindley in *Tolhurst* v. *Associated Portland Cement Manufacturers* (2): "The Judicature Act, 1873, section 25, clause 6, has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own name without joining the assignor."

We are thus able to see at a glance the whole scope of the section, and that it could not have the effect contended for by plaintiff's counsel. The law is therefore practically as I have before stated; no written assignment was or is now required. When we go to the root of the whole matter, I think the reason is plain enough. The money lies in the hands of the bank, a debt to the owner; the terms of the contract under which it is held are set out in the deposit receipt. The deposit receipt is not, like a promissory note, a negotiable instrument, and does not pass by endorsement. When it is handed in and a new deposit receipt taken out, it is not strictly an assignment at all. It is a *novation* or new contract between the bank and the depositor. When the request is orally made by the depositor, and the new deposit receipt is issued to him in the names of the persons nominated by him, the transaction is complete.

The bank is not required to go into any question of trust. It need only recognize the persons named in the deposit receipt unless restrained by a Court of Equity. There is good ground for holding in this case that Nicholas Shevlin did put himself in the relationship from which advancement ought to be presumed; but, apart from all this, I have no doubt on the evidence that he intended the beneficial interest in the money to pass to himself

(1) [1905] A. C. 454, at p. 461. (2) [1903] A. C. 414, at p. 424.

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and the two defendants, and that on the decease of any of them it should remain in the survivors.

I have little to do with the reasons which influenced him. They were hidden in his own mind, and I can enter on no speculation as to why he gave nothing to the plaintiff or his other next-of-kin. The action therefore wholly fails, and must be dismissed with costs.

Solicitor for the plaintiff: *A. A. Wells.*
Solicitor for the defendants Shevlin: *P. T. Kerley.*
Solicitor for the National Bank: *W. H. Dunne.*

D. M. S.

Appeal.
1911.

Nov. 13, 25, 27.

IN RE MACNAMARA'S ESTATE (1).

Land Purchase Code—Land Law (Ireland) Act, 1896, *s.* 35 (1)—*Irish Land Act*, 1909, *ss.* 3, 6, 12 (1)—*Pending purchase-agreement—Unwillingness of Land Commission to sanction advance applied for—Direction to enter into a substituted agreement—Estates Commissioners—Bonus—Finance.*

M., whose estate was being sold to his tenants direct under the Irish Land Act, 1903, signed a purchase-agreement with P., one of his occupying tenants, on the 1st January, 1908, the purchase-money being £1279. On the 14th December, 1909, the Commissioners notified M. that they would advance only £1100, and asked would he accept this sum, which M. refused to do unless P. advanced the balance of the purchase-money in cash. P. at first refused to advance the balance in cash, but on the Commissioners threatening to make a formal order of dismissal, he agreed to do so; whereupon, on the 20th October, 1910, the Commissioners issued a ruling requiring a fresh purchase-agreement in substitution for the original purchase-agreement to be lodged, providing for the payment in cash of the balance of the purchase-money, and such agreement was accordingly lodged.

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that the last agreement should be financed as a pending purchase-agreement, and that the percentage was payable on the amount advanced at the rate of 12 per cent.

(1) Before THE LORD CHANCELLOR (THE RIGHT HON. REDMOND J. BARRY), and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

In re Mac Namara's Estate.

This was an appeal from an order of Wylie, J., dated the 8th June, 1911, made on the hearing of a memorandum by the Estates Commissioners, referring questions of law to him for determination under section 23 (1) of the Irish Land Act, 1903.

The memorandum was as follows:—

1. The above estate is being sold by the vendor to the tenants direct.

2. An agreement, dated the 1st January, 1908, was entered into between the vendor and James M. Power for the sale to him of his holding, consisting of part of the lands of Ballydavid, included in the said estate, for the sum of £1279, and the said James M. Power applied to the Land Commission for an advance of this sum for the purpose of such purchase.

3. On the 14th December, 1909, the Commissioners notified the vendor that they were prepared to advance only the sum of £1100 in respect of the purchase of the said holding, and asked would the vendor accept this sum.

4. The vendor was willing to accept an advance of the said sum of £1100 if the said James M. Power paid the sum of £179, being the difference between the purchase-money as agreed upon and the amount which the Land Commission were willing to advance.

5. The said James M. Power, not at first being willing to lodge the said sum of £179, on the 3rd August, 1910, the Commissioners issued the following ruling to his solicitors:—"Your client being unwilling to pay in cash £179, being the balance of purchase-money over the amount of advance, the Commissioners propose to make a formal order of dismissal on the 10th inst., unless in the meantime you notify his readiness to provide the required sum."

6. The time limited by this ruling was subsequently, at the request of the said James M. Power, extended to the 15th August, 1910, and on that day the solicitor for the said James M. Power notified the Commissioners that the said James M. Power would provide the balance of the purchase-money, £179.

7. On the 20th October, 1910, the Commissioners issued the following ruling to the vendor:—"In this case it is proposed that

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portion of the purchase-money shall be lodged in cash by the tenant; such cash payment not having been provided for in the agreement lodged, the Commissioners now direct you to lodge a fresh purchase-agreement in substitution for the original purchase-agreement, providing for the payment of portion of the purchase-money in cash."

8. In compliance with this direction, on the 24th October, 1910, the vendor lodged a fresh agreement between the vendor and the said James M. Power for the sale and purchase of the same holding for the sum of £1279, of which £179 was to be paid in cash, and the said James M. Power applied to the Land Commission for an advance of the sum of £1100 for the purpose of such purchase, such sum to be repayable by an annuity calculated at the rate of 3¼ per cent. on the amount of the advance, as provided by the Irish Land Act, 1903.

The Estates Commissioners, at the request of the vendor, submit the following questions of law for the consideration of the Judicial Commissioner:—

Can the said last-mentioned agreement be financed as a pending purchase-agreement, and will the percentage be payable on the amount advanced at 12 per cent.?

Is the said last-mentioned agreement a fresh purchase-agreement entered into in substitution for the original agreement within the meaning of section 12 (1) of the Irish Land Act, 1909?

Wylie, J., answered the said questions of law in the negative. Hence this appeal by the vendor.

Henry, K.C., and *Hugh Kennedy*, for the appellant:—

Here the fresh purchase-agreement, forwarded by Mr. Mac Namara on the 24th October, 1910, was entered into in consequence of the direction of the Land Commission of the 20th October, 1910, and consequently it must, under section 12 (1) of the Irish Land Act, 1909, "be deemed to be substituted for the original agreement," and "to have been lodged with the Land Commission at the date on which the original agreement was so lodged." Both questions should, therefore, be answered in the affirmative.

In *Athlumney's Estate* (1) the judgment of Wylie, J., proceeded on the basis that there was a break between the first purchase-agreement and the new one, and that the Estates Commissioners had no jurisdiction to issue the direction to lodge a new purchase-agreement. In the present case, however, section 35 (1) of the Land Law (Ireland) Act, 1896, never operated to make the original purchase-agreement void, and to render the purchasing tenant liable to pay rent and arrears as if the agreement had not been made.

Blackwood's Estate (2) has no application to the present case. There an entirely new purchase-agreement was entered into after the Estates Commissioners had excluded the holding in question from the lands declared a "separate estate," and the question now raised could not have been involved in that case, as the Act of 1909 was not then in operation. In *Domvile's Estate* (3) there was no direction by the Estates Commissioners to lodge a substituted agreement.

The Attorney-General (*The Rt. Hon. Chas. A. O'Connor, K.C.*) and *H. MacDermot,* for the Treasury:—

The first question as to the financing of the new agreement refers to section 3 of the Irish Land Act, 1909, empowering the making of advances by guaranteed stock, and is distinct from that as to the amount of the percentage payable. The Lord Chancellor, in *Domvile's Estate* (3), expressed the opinion that section 12 (1) of the Act of 1909 did not contemplate dealing with bonus at all, and he relied on the provisions of section 6 (1) amending the former provisions as to the percentage. We contend, in accordance with that judgment, that the general provision in section 12 (1) must yield to the particular provisions as to the percentage in section 6.

By section 6 (1) the percentage is to be calculated at the rates specified in the first schedule to the Act, and the proviso in that sub-section, enabling the percentage to be calculated at the rate of 12 per cent., only applies where the estate "consists of

(1) 44 I. L. T. R. 261.
(2) [1909] 1 I. R. 382.
(3) [1910] 1 I. R. 343.

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or includes lands in respect of which there are purchase-agreements entered into, or deemed in pursuance of this section to have been entered into, on or before the 24th day of November, 1908." In the present case the purchase-agreement was not entered into on or before the crucial date, and, admittedly, it cannot be "deemed" to have been so entered into, as it does not fall within any of the four cases mentioned in section 6 (2).

Accordingly, even if it could be held that there was here a substituted agreement entered into by the direction of the Estates Commissioners, the vendor would not be entitled to the bonus at the higher rate, and the agreement ought to be financed under the Act of 1909.

That section 12 (1) was not intended to have any reference to the percentage is shown by sub-section 2 of section 12, which contains express provisions to safeguard the percentage payable where, at the request of the Land Commission, a vendor agrees to sell to the Land Commission or the Congested Districts Board in the cases mentioned. We contend further that the new agreement was an entirely fresh agreement, and not a substituted one. Its terms were distinct from those of the former, as in *Blackwood's Estate* (1), and although in *Blackwood's Estate* (1) the Land Commission formally refused the advance, and here there was no formal refusal, yet the sanctioning of the advance of the lower sum implied a refusal to advance the larger, and section 35 (1) of the Act of 1896 applied to make the first agreement void. Otherwise, two separate agreements, with distinct terms, would have been in existence at one and the same time. The argument of the appellant is based upon a misconception as to the effect of section 12 (1), which merely provides machinery for carrying through a purchase-agreement in the cases mentioned, namely, on the death of a purchaser, or the transmission of a purchaser's interest, or on the Land Commission having made a declaration under section 15 of the Act of 1903, with respect to a sub-tenancy or a sub-divided holding; the further words "or in consequence of any direction of the Land Commission," were added merely for the purpose of providing for any omitted case, and are strictly *in*

(1) [1909] 1 I. R. 382.

pari materia with what went before. An amended agreement, such as this, cannot be a substituted agreement within the meaning of the section. All the questions ought to be answered in the negative.

Henry, K.C., in reply :—

The words of the Lord Chancellor in *Domvile's Estate* (1), which are relied on by the Treasury, were a *dictum* only ; the question as to whether section 12 (1) of the Act of 1909 had reference to the percentage was not there argued, and was not decided. The contention that a vendor's right to the percentage now depends exclusively upon the provisions of section 6 cannot be sustained ; if that be so, it must follow that even in the first case mentioned in section 12 (1), namely, on a fresh purchase-agreement being entered into in substitution for an original purchase-agreement, owing to an accidental transmission of interest on the death of the purchasing tenant, the right to the percentage at the higher rate would be gone in all cases, whether or not the original agreement was entered into on or prior to the 24th November, 1908. Further, sub-section 2 of section 12 would itself be made inoperative, because the agreement there mentioned would not fall within one of the four cases specified in sub-section 2 of section 6, and could not, therefore, be "deemed" to have been entered into on or before the 24th November, 1908. The words "*or* in consequence of any direction of the Land Commission" in section 12 (1) cannot be read "*and* in consequence," &c. Here there was a clear direction by the Land Commission to enter into a fresh purchase-agreement in substitution for an original one, which direction was complied with ; and, accordingly, the fresh agreement must, "for the purposes of this Part of this Act," which include the provisions as to finance, be deemed to have been lodged with the Land Commission at the date on which the original agreement was so lodged, and the same rights must enure to the vendor as if the agreement had been in fact so lodged.

(1) [1910] 1 I. R. 334.

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MAC NAMARA'S ESTATE.

Nov. 27.

THE LORD CHANCELLOR :—

The primary question in this case relates to the application of section 12 (1) of the Irish Land Act, 1909. That is very much a matter of fact, and the result must depend on the view to be taken of the circumstances which have led up to the present litigation. The vendor in the case, in the year 1907, agreed to sell an estate in county Tipperary to his tenants, under the Irish Land Purchase Acts; and one of the tenants, Mr. James M. Power, having agreed to purchase his holding for the sum of £1279, lodged an agreement in that behalf, dated January 1st, 1908, with the Land Commission, and applied for an advance of the whole purchase-money. Several other tenants took the same course, and the lands having been duly declared an estate, the advance of the purchase-money was, speaking generally, granted by the Commissioners. A difficulty arose in the case of Mr. Power with reference to the amount of the advance applied for by him, the Estates Commissioners being of opinion that it ought not to exceed the sum of £1100. Protracted negotiations, inquiries, and correspondence were the result; and under other conditions it might have been well contended that the agreement of Mr. Power had, by virtue of section 35 of the Land Act, 1896, been determined. The suggestion was eventually made, and so far as I can discover, by the Commissioners, that Mr. Power should supplement the advance the Commissioners were prepared to make, by a money payment on his own account, and, in the long run, Power being ready to do so, the Commissioners issued a plain direction that Power should lodge a fresh purchase-agreement in substitution for the original agreement, providing for the payment of part of the purchase-money in cash. That direction was conveyed to Mr. MacNamara by letter from the Commissioners, dated 20th October, 1910. Queries were submitted, and on the face of the document it is stated that in the case of Mr. Power it was proposed a portion of the purchase-money should be lodged in cash by the tenant, and such cash not having been provided for in the agreement lodged, the Commissioners then formally, and in express terms, directed Mr. MacNamara to lodge a fresh purchase-agreement in substitution for the original purchase-

agreement providing for the payment of portion of the purchase-money in cash. There can be no doubt as to the meaning of this direction, and, from its terms, it was clearly made with reference to section 12 (1) of the recent Act, and in exercise or supposed exercise of the Commissioners' authority under it. The direction was complied with on the basis on which it was made. On the 24th October, 1910, Mr. MacNamara returned the form with the reply that the agreement had been lodged in substitution as directed. The proceedings have since proceeded on that arrangement, and the question now is raised whether or not section 12 (1) of the Act of 1909 applies in the case. There can be no doubt, I think, that it was in compliance with the direction of the Commissioners that Mr. Power entered into the fresh agreement, and in substitution for the original purchase-agreement of the 1st January, 1908. It is not disputed that all the parties concerned, including the Estates Commissioners and the vendor, took that view. No suggestion to the contrary was made during the argument, and the learned Attorney-General, who was in a great difficulty, never once questioned the fact that the Commissioners had made a direction for the fresh agreement in substitution for the old. Nor did he, as I recollect, question the fact that the direction was issued with reference to section 12 (1) of the Act of 1909. The Attorney-General so far as I can remember, offered no explanation of the Commissioners' letter of the 20th October, 1910, and he said nothing to suggest that it was not acted on both by the vendor and Mr. Power, and that the fresh agreement was made and lodged accordingly in substitution for the old. No express and open challenge has been made of the authority or power of the Commissioners to issue the direction, which they unquestionably did. Had that point been raised, a serious question would have to be considered, and for my part I fully reserve my opinion upon it. The fact therefore being that a direction was made, in the exercise of an unchallenged jurisdiction and authority to do so, and that a fresh agreement of purchase was entered into, dated the 22nd October, 1910, and in substitution for the original agreement, dated and lodged in January, 1908, I cannot see how in these special facts the Court can do otherwise than hold that the case falls under the operation of sect. 12 (1) of the Act of 1909.

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The Lord Chancellor.

It follows, accordingly, that the sale to Mr. Power should be financed as a pending purchase-agreement. Any other result would appear to be inequitable to the vendor in the particular facts of the case.

Next arises the question of the percentage payable to the vendor on the advances. The point has never been the subject of a decision in this Court, though no doubt there are to be found in the judgment of the late Lord Chancellor in *Domvile's Estate* (1) certain expressions of opinion supporting the respondents' contention in the matter. But there was no decision on the subject by the Court in *Domvile's Case* (1). Judging by the report, the point was not argued. It has been fully argued on the present occasion, and the case being dealt with under section 12 (1) of the Land Act, 1909, it becomes our duty to consider and decide the question. In cases within section 12 (1) it is declared by the section that the fresh agreement lodged shall, for the purposes of Part I of the Act, be deemed to be substituted for the original agreement, and to have been lodged with the Land Commissioners at the date on which the original agreement was lodged. That is a statutory direction that the fresh agreement must be taken as bearing the date of the agreement for which it is substituted for every purpose of Part I of the Act. The percentage provisions are included in Part I of the Act, and it would be a meaningless thing to refer to them in sect. 12 (1), unless it was intended that the section was to have operation in respect of them. The object of the section obviously was that the fresh agreement should be considered for all purposes as nothing else than a continuation of the original agreement. The two sections must be read together, and I cannot but think that the effect and design of section 12 (1) was to enact that the fresh agreement shall be taken for every purpose, including section 6, to have been made in fact on the date of the original. If that be the true meaning of sect. 12 (1), the case falls at once into the category of purchase-agreements entered into on or before the 24th November, 1908, and the old percentage becomes accordingly payable. The late Lord Chancellor, whose opinions, even though incidental only, must

(1) [1910] 1 I. R. p. 334.

always command the greatest respect, referred by way of contrast to the special allusion to the subject of percentage in section 12 (2). But, on full consideration of the point, I think that sub-section was plainly dealing with a somewhat complicated state of facts, and, to be intelligible at all, the fuller and more detailed expression used was necessary for clearness. I do not think its fullness can be any limitation upon the generality of section 12 (1), which is declared to be applicable for every purpose of Part I of the Act. It cannot but be noted too that the construction attempted to be placed on section 12 (1) would involve, particularly in the special cases mentioned, a grave loss, which it would appear difficult to justify. The Attorney-General's answer was that section 6 was self-contained, and, exclusively of the rest of the Act, dealt alone with the question of the percentage. He insisted that no case not falling precisely under the terms of the provisions in section 6 could be accorded the old percentage. Well, as I have already said, I think the present case is in substance declared to be within the terms of the proviso, and the Attorney-General's argument is, I think, conclusively answered by section 12 (2) of the Act. It undoubtedly deals with the subject of the percentage, and while under it it is clear that the 12 per cent. bonus may be paid with reference to the agreements mentioned therein, I should find it hard to understand how that direction could be carried out on the construction placed by the Attorney-General upon the supposed exclusive provisions of section 6. The cases arising under section 12 (2) would not come within the terms of the proviso in section 6, and how in that situation could the statutory direction be carried out at all? Reading, as we must do, the two sections 6 and 12 together, the construction I have placed on them appears to be the only natural and reasonable interpretation. The answer on the point must therefore be in the affirmative, and the appeal should, I think, be allowed.

HOLMES, L.J. :—

To understand the questions of law referred by the Estates Commissioners to Mr. Justice Wylie, which have led to this appeal, it is necessary to state briefly the previous proceedings in the matter. Mr. MacNamara being desirous to sell his estates

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to the tenants under the Land Purchase Acts, agreed with them for the sales of their holdings. Amongst them a gentleman called Power entered into an agreement with him, dated the 1st January, 1908, by which it was provided that if this estate, comprising the holding of Ballydavid, should be sold under the provisions of the Irish Land Act, 1903, the vendor would sell and the tenant would purchase the said holding for the sum of £1279, and that the tenant would apply to the Land Commission for an advance of all the purchase-money, to be repaid as provided by the Act. This application was duly made, and the next step seems to have been what is called a query from the Estates Commissioners to Mr. MacNamara, dated the 14th December, 1909, saying that the Commissioners were prepared to advance only £1100, and asking would the vendor accept this sum, to which there was a reply on the 15th February, 1910, that the vendor would not accept the price offered, and asking that the holding should be excluded from the sale, if the full amount would not be advanced. This was followed by another "query" of the 3rd June, saying that the Commissioners were not prepared to exclude the holding from sale. The reply was a letter from Mr. MacNamara of the 4th June, entering into some details, the important portion of which was that the vendor was quite willing to sell to Mr. Power at the price agreed upon, and that he could pay the difference between the £1100 and the purchase-money in cash; but if he was not prepared to do so, and unless the Commissioners were willing to exclude the holding from the sale, the whole sale—that is, the sale of all the estate—must fall through, and the vendor would be obliged to withdraw the case.

On the 3rd July the Commissioners again wrote to the vendor, saying that, having regard to the fact that they were not prepared to advance more than £1100, they were of opinion that the tenant should pay £100 in cash, and that if he refuses, they would exclude the holding from the sale. The reply was that the vendor would not accept less than £1279, and that the tenant, if he wishes to purchase, can pay the difference of £179 in cash.

Up to this time no communication seems to have been made by the Estates Commissioners to the purchaser, but on the 15th July he was informed that only £1100 would be advanced, and

that if he was not prepared to pay the balance in cash, the holding would be excluded from the sale. The reply of the 21st July was that the tenant ought not to be required to pay the balance, and that the landlord should be required to accept the £1100. The next communication was critical. The Commissioners, on the 3rd August, informed the purchaser that they proposed to make a formal order of dismissal on the 10th inst., unless he would in the meantime notify his readiness to provide the required sum. The time named was, at the request of the purchaser, extended for a few days, and before it expired he notified to the Commissioners that he would provide the balance of the purchase-money, £179. This was followed by a document of the 20th October, addressed to Mr. MacNamara in the following words:—"Advance applied for, £1279. In this case it is proposed that portion of the purchase-money shall be lodged in cash by the tenant; such cash payment not having been provided for in the agreement, the Commissioners now direct you to lodge a fresh purchase-agreement in substitution for the original agreement providing for the payment of portion of the purchase-money in cash." A fresh agreement was lodged in substitution as directed on the 24th October, 1910. The only additional document was one addressed to the vendor on the 28th February, 1911, in the following words:—"With reference to the agreement for the purchase of the above holding which was lodged on the 24th October, 1910, a new agreement should be entered into in accordance with the provisions of the Act of 1909, and lodged in this office." It is difficult to account for this document, except as an attempt to deprive the purchaser of whatever legal advantage the order of the 20th of October, and the compliance therewith, gave him; but as the adoption of this view would involve the imputation of misconduct to a public servant, I assume that the minute in question can be explained in some other way. Fortunately, Mr. MacNamara was not misled by it, as his reply was that he had lodged the agreement of the 24th October under a direction of the Commissioners given under section 12 of the Act of 1909 in substitution for the first agreement, and that he, therefore, claimed that the case should proceed under the Act of 1903.

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In these circumstances, the Estates Commissioners referred to Wylie, J., two questions of law, of which the first asks, Can the agreement of October be financed as a pending purchase-agreement, and will the percentage be payable on the amount advanced at 12 per cent.? The second question is, whether the said agreement is a fresh agreement entered into in substitution for the original agreement within the meaning of section 12 of the Act of 1909. Questions under this section have occasionally come before Wylie, J., and on two occasions they have led to an appeal to this Court: *Blackwood's Estate* (1) and *Domvile's Estate* (2). By the Act of 1909, Part I., Land Purchase Finance, the mode of financing a land-purchase agreement depends upon whether it is lodged with the Land Commission or entered into by or with that Commission or the Land Judge or the Congested Districts Board on or before the 15th September, 1909. So also by the Act, the percentage or bonus payable on a purchase-agreement to the vendor depends upon whether the agreement has been entered into on or before the 24th November, 1908. The object of section 12 (1) is apparently to provide that, in certain circumstances, a purchase-agreement entered into after the respective dates mentioned shall for the purposes of the first part of the Act be deemed to be substituted for the original agreement, and whenever lodged with the Land Commission, to have been so lodged at the date on which the original agreement was lodged. The circumstances in which the aforesaid provision is to come into operation are (1) where by reason of the death of the purchaser, or (2) by the transmission of the purchaser's interest in a holding, or (3) in cases arising under section 15 of the Act of 1903, or (4) in consequence of any direction of the Land Commission a fresh purchase-agreement is entered into in substitution for an original purchase-agreement previously made. In any of such four cases it is enacted that the fresh purchase-agreement shall for the purposes of the first part of the Act be deemed to be substituted for the original agreement, and to have been lodged with the Land Commission at the date on which the original document was so lodged. In the present case there is no doubt

(1) [1909] 1 I. R. 382. (2) [1910] 1 I. R. 334.

that the fresh agreement of the 24th October, 1910, is not within any of the first three heads. It is equally clear that in terms it comes within the fourth head, for it was entered into in consequence of a direction of the Land Commission in substitution for an original purchase-agreement previously made. I have already quoted verbatim from the document of the Land Commission of the 20th October, which can bear no other meaning; and the first question in this appeal is, whether the Land Commission had jurisdiction to give this direction. The cases I have mentioned give us, in my opinion, no help on the point. In *Blackwood's Estate* (1), the vendors lodged an originating application for the sale of certain lands, including the holding of a tenant called Hanbury, who had agreed to purchase his holding for £5010, and had applied to the Land Commission for an advance of the entire sum. The Estates Commissioners excluded Hanbury's holding from their declaration declaring the lands a separate estate; and afterwards made an order refusing the advance applied for. This put an end to Hanbury's agreement; and afterwards Hanbury and the vendor made an entirely new agreement for a sale on wholly different terms apparently without any communication with the Land Commission, and certainly not in consequence of any direction from it. This new agreement having been made after the 24th November, 1908, it was held that the vendor was not entitled to the bonus under the Act of 1903, and could only claim it at the rate prescribed by the Act of 1909.

In *Domvile's Estate* (2) three tenants in the year 1905 agreed with the vendor to purchase their holdings for certain sums, and to apply to the Land Commission for an advance, two of them for the full amount and the third for the greater portion of the purchase-money. The Estates Commissioners sent a query to the vendor's solicitor stating that the Commissioners were only prepared to advance specified sums much smaller in amount. No direction pursuant to section 12 was given by the Land Commission; but it was said that the tenants themselves were prepared to pay the difference between their respective purchase-

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moneys and the sums the Commissioners were prepared to advance. No new agreement, however, was made to this effect. It was argued that the query I have quoted was in itself a direction within section 12. Wylie, J., said that it seemed to him much more like a refusal to sanction the advance applied for. It was not, however, a refusal in itself; but the parties acted on it as if it were a refusal, and suggested to the Commissioners that they would enter into another agreement. No direction, however, to do so was given. The judgment of this Court was, that by the query and the action of the parties therein, the old agreements were put an end to; and there being no agreement in existence, section 12 gave the appellant no help, inasmuch as there was no direction to make fresh purchase-agreements nor any agreements purporting to be made pursuant to such direction.

The circumstances of these cases are wholly different from those now before the Court. The only resemblance is the memorandum in a query-sheet sent to the vendor, saying that the Commissioners were prepared to advance only £1100, and asking would the vendor accept this sum, to which the reply was given, asking that the holding should be excluded from the sale if the full amount would not be advanced. This the Commissioners refused to do, whereupon Mr. MacNamara wrote the letter of the 4th June, already quoted, the important point of which for my present purpose is the statement that, unless he was paid the full price agreed on, the sale of all the estate must fall through, as the vendor would be obliged to withdraw the case. After this, the Commissioners suggested to the vendor in a query-sheet that the tenant ought to pay £100 in cash, and that if he refuses they would exclude the holding from the sale, whereupon the vendor replied that he would not accept less than the purchase-money in the agreement, £1279. I am satisfied that up to this point the original agreement was still pending—the correspondence can have no other meaning; and what, to my mind, is absolutely conclusive is, that until the 15th July the Commissioners never informed the tenant who had applied for the advance that they were not prepared to give the full amount; nor is there any evidence that the tenant was aware of what had passed between the Commissioners and the vendor. My

inference from the documents is that he was not so informed. He was then told that if he was not prepared to pay the balance in cash the holding would be excluded from the sale; and a fortnight later he was told that the Commissioners proposed to make a formal order of dismissal; that is to say, of either the holding or the entire estate—unless within a time limited he would notify his readiness to provide the required sum. This he did; and there followed the document, already quoted, of the 20th October, purporting to be a direction under section 12. For the reasons stated, I am of opinion that when that direction was given, the original agreement was still pending, and, therefore, the case is not ruled by *Blackwood's Estate* (1) or *Domvile's Estate* (2). It is, however, argued on the construction of section 12, that the direction is without jurisdiction, because such direction can only be given in the three first cases specified in that section, or in a case substantially identical therewith. This view is to be found in Wylie, J.'s judgment in *Domvile's Estate* (2), where he says—"I think that there can be no doubt that in all the cases specially mentioned in the section" (that is, the first three) "it means a fresh agreement, embodying the terms of the original agreement, and entered into by direction of the Land Commission for the purpose of carrying out the original agreement"; and he holds that this also must be the characteristic of class four.

It is strange that the practice of the learned judge has been inconsistent with this proposition, for he tells us in *Blackwood's Estate* (1) that where there was a mere reduction of purchase-money—where, for example, the purchase-price was £500, and, on the Commissioners refusing to advance more than £450, the vendor agreed to sell for that sum, he had been in the habit of holding that such a case comes within the section. I am obliged to say that this seems to me a much greater deviation from the original agreement than in the present case, where there is no change in the amount of the purchase-money—the really important matter between vendor and purchaser.

In my opinion the narrow view of section 12 stated by Wylie, J., is not justified by its language. The words, "or in

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consequence of any direction of the Land Commission," add a fourth class to the three already mentioned, in which no such direction is required; and I have no doubt that the object and effect of these words were to give a discretion to a public department to authorize, in cases which it regards as fitting, the substitution of a fresh agreement for a previous agreement still pending. I may add that I cannot conceive a more fitting case in which to exercise such discretion than the present, where there is no change either in the property agreed to be sold, or the amount of the purchase-money.

I have thus stated my view of the facts of the case, and of the construction of the section, and if I am right in my opinion on these matters, it has not been, and cannot be, argued that the agreement of October ought not to be financed as a pending purchase-agreement. Another question, however, has been raised in reference to the percentage payable to the vendor. In *Domvile's Estate* (1), the Lord Chancellor expressed an opinion, in which neither the Lord Chief Justice nor I concurred, although we did not discuss the matter, as it was not necessary for us to decide it. It turns, in the first place, on section 6 of the Act of 1909, section 1 of which enacts that the percentage payable under section 48 of the Act of 1903 shall be calculated at the rate specified in the first schedule to the Act of 1909, which shall be deemed to be the percentage under the previous statute, "provided that the percentage payable on the purchase-money of an estate which consists of or includes land in respect of which there are purchase-agreements entered into, or deemed in pursuance of this section to have been entered into, on or before the 24th November, 1909, shall (so far as the percentage is payable in respect of the purchase of these lands) be calculated at the rate of 12 per cent. instead of being calculated under this section."

Sub-section 2 then enumerates five cases in which an agreement for a purchase, though not entered into before the 24th November, 1908, shall be deemed for the purposes of the section to be a purchase-agreement entered into on or before that date. The present case is not one of the five enumerated cases; but I

(1) [1910] 1 I. R. p. 334.

am unable to see when section 12 (1) provides that the fresh purchase-agreements mentioned therein shall for the purposes of this part, that is Part I of the Act, be deemed to be substituted for the original agreement, and, whenever lodged with the Land Commission, to have been lodged at the date on which the original agreement was so lodged, that the effect is not to place it for all purposes, including the purpose of the bonus, in the same position as an agreement lodged at that date. It seems to me that the very object of using in this enactment the general terms employed was to prevent all controversy as to what advantages were to be gained by the substituted agreement. The intention was to give it in every respect the same rights and incidents as an agreement lodged at the date of the agreement for which it was substituted. I have little doubt that this was not only what is expressed, but what was intended by the statute. The first case mentioned in the section is the death of the purchaser, in which event either his legal personal representative or the vendor could without the section make the other a party to the contract. I cannot conceive if this were done and the sale proceeded, the vendor would be in a worse position than if the purchaser had lived; but this is the result of the construction which the Attorney-General asks us to put on sections 6 and 12. I notice that Walker, L. C., refers to the difference of language between sub-sections 1 and 2 of section 12; but the sub-sections are drafted on wholly different lines, and no inference as to the construction of one can be drawn from that of the other.

For these reasons I hold that both questions ought to be answered in the affirmative.

CHERRY, L.J.:—

The vendor in this case on the 1st January, 1908, entered into an ordinary agreement for the sale of a holding to one of his tenants named James M. Power under the Irish Land Act, 1903. The only provisions of that agreement that are material for our present consideration are the first and second, which are in the following terms:—

"In case an estate comprising the said holding shall be sold

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under the provisions of the Irish Land Act, 1903, the vendor hereby agrees to sell, and the tenant hereby agrees to purchase the said holding for the sum of £1279.

"The tenant shall apply in the prescribed form to the Irish Land Commission for an advance of the sum of £1279 for the purpose of such purchase to be repaid as provided by the Irish Land Act, 1903."

The agreement was duly lodged in the Land Commission along with those of other tenants upon the estate, and a declaration that all the holdings proposed to be sold constituted an "estate" was duly made.

Subsequently, the Estates Commissioners by a minute upon the rental intimated to the vendor that in this particular case they were only prepared to advance £1100, though they were prepared to advance the full amount applied for in the case of all the other holdings upon the estate. They further inquired from him whether he was willing to accept the lesser sum in lieu of that for which he had previously agreed to sell, but he refused to do so, and suggested as an alternative that the tenant should provide the difference between the purchase price agreed upon and the amount which the Land Commission were willing to advance in cash. This the tenant, after some negotiation, ultimately agreed to do on the 15th of August, 1910.

The next step of importance was taken by the Estates Commissioners. On the 20th October, 1910, they served upon the vendor a document which was called a "query," but was in reality a direction in the following terms:—

"In this case it is proposed that portion of the purchase-money shall be lodged in cash by the tenant; such cash payment not having been provided for in the agreement lodged, *the Commissioners now direct you to lodge a fresh purchase-agreement in substitution for the original purchase-agreement* providing for the payment of portion of the purchase-money in cash."

Four days afterwards the vendor complied with this direction, and lodged a fresh purchase-agreement, signed by both landlord and tenant, and identical in its terms with the previous agreement, except as to the amount of advance applied for, and the payment in cash by the tenant.

The direction given by the Estates Commissioners closely followed in its terms the words of section 12 (1) of the Irish Land Act, 1909, and I can have no doubt whatsoever that, whatever its legal effect may be, it was intended by the Estates Commissioners to be a direction within the meaning of that section, and was so accepted by the vendor. Otherwise I cannot conceive how, after having refused to accept £1100 for the holding, with a 12 per cent. bonus, he would have agreed to a course which, if the contention of the Treasury is right, will result in his receiving, by reason of the depreciation of the stock in which he will be paid, and the loss of the bonus, considerably less than that sum. There was nothing in the world to prevent the old agreement being carried out if the tenant was willing, as he was, to provide the balance of the purchase-money over and above what the Land Commission was prepared to advance in cash. In my opinion the vendor could not have refused to carry out the old agreement, as it made no difference to him where the money came from, provided he got the whole amount for which he had agreed to sell. It seems to me that it was something very closely approaching a breach of faith for one Government department to induce a man to sign and lodge an agreement under a clear representation that his position would not be altered by doing so, and then for another Government department to come forward and contend that the new agreement diminishes the amount of purchase-money he will receive, to the extent of several hundred pounds.

The Attorney-General, however, pressed us with the authority of two cases which he contended compel us to hold that this second agreement, lodged on the 24th October, 1910, was not, though it was manifestly intended to be, a substituted agreement within the meaning of the 12th section of the Irish Land Act, 1909. These are *Blackwood's Estate* (1) and *Domvile's Estate* (2). Let us see what these two cases decide.

In *Blackwood's Estate* (1) it appeared that an occupying tenant named Hanbury, in the year 1905, agreed to purchase his holding under the Land Purchase Acts for £5010. The agreement was lodged with other agreements on the landlord's property. The Estates Commissioners made an order on the 24th November, 1908.

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refusing to sanction the advance to Hanbury, and excluded his holding from the lands which they declared to be a separate estate for the purpose of the sale, and the sale of the other lands was duly carried out. Subsequently, in December, 1908, Hanbury agreed to purchase his holding for £4500, of which sum he agreed to provide £1500 in cash, and applied to the Land Commission for an advance of the balance, viz., £3000, which they agreed to make, and it was held that the agreement of December, 1908, was a new agreement, and that the vendor was only entitled to a bonus at the rate of 3 per cent. under the new regulations of 24th November, 1908. The facts of that case were as different as possible from those we are now dealing with. There was an absolute refusal by the Estates Commissioners to make the advance first applied for. The holding was excluded from the estate sold. The new agreement to purchase was for a different price, and a considerable part of this was to be paid in cash. This Court naturally, under these circumstances, held that a new agreement had been entered into.

But *Blackwood's Estate* (1) can in no point of view be an authority as to the construction of the 12th section of the Land Act of 1909, inasmuch as not only were both agreements entered into before that Act passed, but the case was heard and determined also before that date.

Domvile's Estate (2) is a case much more like the present one, and it was upon it that the Attorney-General mainly relied in his able argument in this case. Read superficially, it undoubtedly appears to be a very strong authority against the view we are now taking. But the facts were in some important respects quite different from those now before us. The Estates Commissioners had refused to make the advance applied for, not in respect of one, but of all the holdings on the vendor's estate, *no new agreements were entered into*, but the vendor expressed his willingness to enter into new agreements, provided he was assured of getting the 12 per cent. bonus. Thereupon the Estates Commissioners submitted to the Judicial Commissioner four questions, two of which only, namely the first and second, have any bearing upon the present case. The first question being

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of a purely hypothetical character, Wylie, J., refused to answer, and his order so refusing was affirmed by this Court. The question was merely, if a direction were given by the Land Commission under section 12 (1) of the Act of 1909, and the sales then proceeded with, would the new agreements entered into be financed as "pending purchase-agreements," and would the bonus be payable at the old rate of 12 per cent.? That is the question we have now to answer in the present case, where there undoubtedly has been such a direction.

The other question was, *if no such direction were given*, could the new agreements be financed as "pending purchase agreements," and would the percentage be payable at the old rate of 12 per cent.? To that the answer was of course "No"; but how can that answer help the Treasury argument in this case, where there undoubtedly has been such a direction? The facts that a positive direction was given by the Estates Commissioners in this case, and that in pursuance of that direction the new agreement was lodged, while there was no such direction and no new agreements were lodged in *Domvile's Estate* (1), render the decision in the latter case no authority whatsoever in the present one. There may be passages in the judgments which assist the arguments of the respondents in this case, but you cannot safely take as a guide extracts from judgments without, at the same time, bearing in mind what the Court actually decided in the case cited. The actual decision in *Domvile's Estate* (1) is not in any way an authority against the view we are taking in the present case.

There remains for consideration the last argument of the Attorney-General, viz., that section 12 (1) of the Land Act of 1909 does not affect the question of the bonus at all, and that the question of the amount of the bonus must be determined by reference only to section 6 of the same Act. This was undoubtedly the opinion of the late Lord Chancellor (Sir Samuel Walker), and he has clearly stated this view in his judgment in *Domvile's Estate* (1); but neither of the other members of the Court expressed any opinion upon this point, and its determination cannot be said to have been necessary for the decision of the case. I confess that, much as I respect the

(1) [1910] 1 I. R. 334.

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opinion of so great a lawyer, I cannot agree with him in this view. When the section provides that any such fresh agreement entered into in consequence of a direction of the Land Commission shall "for the purposes of this part of this Act," be deemed to have been lodged at the date on which the original agreement was lodged, it must mean "deemed to have been lodged" for the purposes of section 6, inasmuch as section 6 is in the same part of the Act as section 12; and this brings the agreement in the present case within the first sub-section of section 6, without having resort to sub-section (2) of that section at all. The four special cases mentioned in sub-section (2) of section 6 would thus be supplemental to, and not in substitution for, those deemed to have been entered into at an earlier date under section 12 (1).

What strengthens me most in this view is that any other construction of section 12 (1) would lead to manifest and gross injustice. Let us suppose for a moment that section 12 (1) is confined in its operation to the financing of the sale, and does not deal with the bonus. Take the very first concrete case mentioned in the section, "where by reason of the death of the purchaser" a new agreement is lodged. Such new agreement is not required by law. A successor in title to the purchasing tenant is bound to carry out the agreement entered into by his predecessor. The vendor's position is not in any way changed, But the Land Commission for their own convenience require a new agreement to be lodged so as to enable them to vest the holding in the purchaser by fiat of the agreement, instead of by the more cumbrous method of vesting order; surely it would be a very gross injustice if the effect of the vendor complying with the request of the Land Commission were to deprive him of the bonus to which he was clearly entitled under his original agreement. Yet such must be the effect unless we hold that sub-sect. (1) of section 12 applies to the amount of the bonus as well as to the financing of the sale.

For these reasons I am of opinion that the judgment of Wylie, J., should be reversed, and that the questions submitted to us should be all answered in the affirmative.

Solicitor for the vendor: *Richard A. Mac Namara.*
Solicitor for the Treasury: *W. G. Towers.* R. ST. J. C.

JOHNSTON *v.* O'NEILL.

H. L.
1911.
Feb. 16.
July 14.

Several fishery—Navigable non-tidal lake—Public user—Prescription—Evidence—Crown grants.

APPEAL by the defendants from the judgment of the Court of Appeal ([1909] 1 I.R. 237). The case was first argued in 1910, before Earl Loreburn, L.C., and Lords Ashbourne, James, and Dunedin, and was re-argued in February, 1911, before Earl Loreburn, L. C., Earl Halsbury, and Lords Ashbourne, Macnaghten, Dunedin, Shaw of Dunfermline, and Robson.

Gordon, K.C., and *T. M. Healy, K.C.* (with them, *J. P. Kerr*), for the appellants.

Ronan, K.C., and *Jellett, K.C.* (with them, *Gaussen, K.C.*), for he respondents.

The House of Lords affirmed the decision of the Court of Appeal, *diss.* Earl Loreburn and Lords Shaw and Robson, who held that there was no satisfactory evidence to show any actual possession or any right in the Crown or the grantees to the exclusive fishery claimed (1).

Solicitor for the appellants: *Herbert Z. Deane*, for *L. A. Meenan.*

Solicitors for the respondents: *Wansey, Stammers, & Co.*, for *French & French.*

(1) [1911] A C. 552.

Barton, J.
1911.
July 11, 12, 14, 24.

IN THE MATTER OF THE ESTATE OF HENRY MAC DOUGALL, DECEASED; GEORGE VAUGHAN HART AND ANOTHER *v.* RONALD MACDOUGALL AND OTHERS.

Settled lands—Trust for sale—Election to take balance of proceeds as realty—Conversion—Reconversion—Acts showing intention.

A testator by his will devised all his real and personal estate to his trustees, and, after directing them to complete the purchase of the reversion in fee of part of the lands of D., held by him under a sub-lease (which was subject to his mother's life interest therein under a prior will), declared that his trustees should, at their discretion, at any time after the death of his mother, or during her lifetime with her consent, sell his interest in the lease of D. and the reversion in fee expectant on the determination of said lease and his other property at D., which was held by him under chattel tenure, and if sold during his mother's lifetime he directed his trustees to pay the income arising from the produce of such sale to her during her life, and, after her death, out of said purchase-money to pay (*inter alia*) a legacy of £1000 to his sister E., and declared that any balance, after the payments aforesaid, should form part of his residuary estate and be added thereto. And testator further directed that his trustees should stand possessed of (*inter alia*) his freehold lands of K. and other property, and, at their discretion, from time to time, sell the same or any part thereof, and out of the amount realized by such sale make certain specified payments, including (*inter alia*) a debt of £287 due to his mother, and then a sum of £2500 to his sister H. (which by a codicil to his will he directed should not be raised till after his mother's death, but that all interest thereon should be paid to her meanwhile), and a life annuity of £100 to his sister W., and to apply the balance in clearing off certain charges therein mentioned, and testator left all the residue of his property to his sister H. absolutely. H. was one of the trustees appointed under said will, and from 1902 was sole surviving trustee thereof.

The testator died in 1893. The trustees thereupon completed the purchase of the reversion in fee of part of the lands of D., as directed by the will. The trusts for sale contained in the will were not carried out. The premises subject to the second trust for sale were insolvent as to income, but solvent as to capital, the balance of the income, after providing for prior charges, being always divided equally between H. and W. on foot of their respective charge and annuity.

With regard to the premises subject to the first trust for sale, in 1900, H. put an indorsement on two leases of portion of the lands of D. held under chattel tenure in which she described herself as residuary legatee of the testator, and further accepted and made leases of portion thereof; and, with regard to the premises subject to the second trust for sale, in 1910, H. presented an Originating Request for the sale of the freehold lands of K. to the Irish Land Commission, and therein described herself as "absolute owner" of said lands. H. predeceased her mother, and died in 1910. On questions arising, between the heir-at-law and the next-of-kin of H., as to who was now entitled to (*a*) the reversion in fee of part of the lands of D., and (*b*) the freehold lands of K.:—

Held (assuming, in the case of both trusts for sale, that a conversion took place) first, in the case of the first trust for sale, that H. was capable of declaring whether she would take the balance devised and bequeathed to her in its unconverted state or not; that, although the question was only material with reference to the reversion in fee of part of the lands of D., her intention might be inferred from her acts with reference to the other parts of the lands of D. held under chattel tenure; and that her acts in relation thereto afforded evidence of an unequivocal declaration of intention to retain that balance in its unconverted form. *Meek* v. *Devenish* (6 Ch. D. 566), and *In re Potter* (3 T. L R. 430), applied. Secondly, that, in the case of the second trust for sale, the act of H. in describing herself as "absolute owner" in the Originating Request presented for the sale of the freehold lands of K. was sufficient evidence that she had elected to hold these lands as real estate subject to incumbrances, and not as a balance of money coming to her, after conversion under the will.

ORIGINATING SUMMONS.

From the affidavit of Charles Henry Crookshank the following facts appeared:—

By his will, William MacDougall, who was entitled to considerable real and personal estate, devised his property between his widow, Mrs. Elizabeth MacDougall, and his children in manner therein provided, and amongst other devises and bequests he left a life interest in the house and lands of Drumleck, Howth, county Dublin, held under sub-lease, as hereinafter mentioned, to his widow for her life, and charged certain lands called Brownsbarn and Fosse, county Kilkenny, with payment of a sum of £1000 for his daughter Elizabeth, and a sum of £500 for his daughter Henrietta, and further charged certain other lands called Kill and Cregnanagh, county Mayo, with an annual sum of

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£100, payable during the life of the Rev. J. P. Mahaffy. Testator left the residue of his real and personal estate, subject to his debts, to his son Henry MacDougall. Testator died on the 2nd May, 1875.

The residuary estate of the testator proved insufficient for payment of the debts and charges thereon. It included (*inter alia*) the following assets:—certain house property in Gardiner Street and Belmont Place, Dublin, and a policy of insurance on the life of the Rev. J. P. Mahaffy for £3000. The debts included a sum of £2000 payable to the trustees of his daughter Mrs. Mahaffy's settlement on the death of the Rev. J. P. Mahaffy, and a sum of £1500 payable to the trustees of his daughter Mrs. Stokes' settlement. By deed of family arrangement, the beneficiaries under the will undertook to provide an annual sum to make up the deficiency.

At the time of his death, hereafter stated, Henry MacDougall was possessed in his own right, as distinguished from any interest he had as residuary devisee and legatee of his father, of (*inter alia*) the following property:—

A. The said lands of Brownsbarn and Fosse, county Kilkenny.

B. The lands of Lowhill and Coolroe, county Kilkenny, held in fee-farm subject to two fee-farm rents of £88 15s. and £4 1s., and to a charge of £4208 14s. 4d. also vested in him subject to his mother's life interest therein.

C. The said lands of Kill and Cregnanagh, county Mayo, held in fee-simple, subject to a life annuity of £80 and to a mortgage from John MacDougall to him the said Henry MacDougall to secure £1050, and to the said annuity of £100 per annum payable during the life of the Rev. J. P. Mahaffy.

D. Certain lands at Howth, county Dublin, consisting of:—(*a*) Drumleck House and lands held under sub-lease dated the 30th October, 1845, for 88 years at a rent of £55, subject to the life interest of Mrs. Elizabeth MacDougall therein; (*b*) part of the lands of Censure, or Cenchoir, containing about 16 acres, held under leases from Lord Howth; (*c*) certain lands known as "the Bog of Loughs" containing 30 acres or thereabouts, held for a statutory term from Lord Howth; (*d*) two cottages held for thirty-one years, from 1888, at a rent of £8 10s.

E. The lands of Cullenswood, county Dublin, held subject to a rent of £40 5*s*.

Henry MacDougall made his will, under which he appointed Henrietta MacDougall and H. B. Ruttledge trustees and executors, and devised and bequeathed to them all his real and personal estate upon the trusts therein declared, that is to say (*inter alia*) as to the lands of Brownsbarn and Fosse for his brother Donald absolutely, and after directing his trustees to complete the purchase of the reversion in fee of Drumleck, he directed that his trustees should, at their discretion, at any time after the death of his mother, or during her lifetime with her consent, sell his interest in the lease of Drumleck and the reversion in fee expectant on the determination of said lease, and his other Howth property, and if sold during his mother's lifetime he directed his trustees to pay the income arising from the produce of such sale to her during her lifetime, and after her death out of the said purchase-money to pay the legacies of £1000 and £500 payable under his father's will out of Brownsbarn and Fosse and all interest due thereon; and also to pay thereout whenever the same should become payable the sum of £1500 payable under the covenant of his father contained in the settlement on the marriage of his sister, Mrs. Stokes, and all interest due thereon; and the testator declared that any balance after the payments aforesaid should form part of his residuary estate and be added thereto; and the testator directed that his trustees should stand possessed of his said lands of Lowhill and Coolroe, Kill and Cregnanagh, and premises in Cullenswood and premises in Gardiner Street and Belmont Place and certain farming stock and all mortgage and other debts due to him and all the rest and residue of his said estate real and personal, save such property as by his will he had otherwise disposed of, and at their discretion from time to time to sell or dispose of the same or any part thereof, and out of the amount realized by such sale to pay his debts, funeral and testamentary expenses, and then to set aside and invest so much capital as should be sufficient to meet the annual premium payable on the policy of insurance on the life of the Rev. J. P. Mahaffy as mentioned in the family deed, and to pay such premium from time to time out of the interest of such sum, and

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then to pay to his sister, Henrietta MacDougall, a sum of £2500 and interest at 4 per cent. until paid, and to his sister, Mrs. Watson, during her life an annuity of £100 a year, and he directed his trustees out of the proceeds of such sale, after providing, for the payment of said premium, said sum of £2500, and said annuity of £100 a year, to apply the balance in clearing off the charges due on the real and personal residuary estate bequeathed to him by his late father, and, after making certain other bequests, including a bequest of £300 to his brother, Donald MacDougall, the testator left all the rest and residue of his property to his sister, Henrietta MacDougall, absolutely. By a codicil to his will, the testator directed that the £2500 bequeathed to his sister, Henrietta MacDougall, should not be raised till after his mother's death, but that all interest thereon should be paid to her in the meantime.

The testator died on the 15th January, 1893.

After the death of Henry MacDougall the trustees of his will completed the purchase of the reversion in fee in Drumleck, and subsequently the surviving executor of the will of William MacDougall sold the said property in Gardiner Street and Belmont Place, and, with the concurrence of Henrietta MacDougall, surrendered the policy of £3000 on the life of the Rev J. P. Mahaffy, taking in lieu thereof two fully paid up policies for £2000 and £300 payable on the death of the Rev. J. P. Mahaffy, the former being appropriated to meet the debt due to the trustees of Mrs. Mahaffy's settlement, and otherwise generally realized the residuary estate of William MacDougall, and further paid all the debts and liabilities of William MacDougall, including the sum of £1500 due to the trustees of Mrs. Stokes' settlement, but excepting the sum of £2000 due to the trustees of Mrs. Mahaffy's settlement, which was provided for in manner already stated, and the annuity of £100 charged by the will of William MacDougall upon the lands of Kill and Cregnanagh. By reason of the final winding up of the affairs of William MacDougall the trusts of the will of Henry MacDougall relative to the payment of the said sum of £1500 to the trustees of Mrs. Stokes' settlement, the sale of property in Gardiner Street and Belmont Place, and the keeping up of the policy on the

life of the Rev. J. P. Mahaffy, and with reference to the residuary estate of William MacDougall became inoperative.

At the date of the death of Henrietta MacDougall, hereinafter stated, in addition to the charges vested in her in her own right, the following charges, for the payment of which the trusts for sale contained in the will of Henry MacDougall were created, remained unsatisfied, viz.:—

(*a*) The legacy of £1000 given by the will of William MacDougall to his daughter, Elizabeth MacDougall, and directed by the will of Henry MacDougall to be paid out of the purchase-money of the whole Howth property. (*b*) The annuity of £100 given by the will of Henry MacDougall to his sister, Mrs. Watson. (*c*) A debt of £287 due by Henry MacDougall to his mother, Mrs. Elizabeth MacDougall; and (*d*) £300 bequeathed to Donald MacDougall by the will of Henry MacDougall.

The income of the trust premises subject to the second trust for sale had been insufficient to meet the charges thereon, and the balance remaining every year had been divided equally between Henrietta MacDougall and Mrs. Watson on foot of their respective charge and annuity, both of which were largely in arrear. It appeared, however, that the said trust premises were solvent as to capital.

Shortly after the death of Henry MacDougall, Donald MacDougall sold the lands of Brownsbarn and Fosse through the Irish Land Commission, and the persons entitled to the legacies of £1000 and £500 charged thereon elected not to claim payment thereof out of the purchase-moneys, but to rely on the provisions of the will of Henry MacDougall.

In 1902 Donald MacDougall was appointed a trustee of the will of Henry MacDougall in lieu of T. H. B. Ruttledge. Donald MacDougall died unmarried in the same year, and thereupon Henrietta MacDougall became sole trustee of the will of Henry MacDougall.

The following acts and declarations by Henrietta MacDougall were proved in the following paragraphs of the affidavit:—

25. In 1908 Henrietta MacDougall presented an originating request for the sale of the lands of Kill and Cregnanagh, county

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Mayo, to the Irish Land Commission, and therein described herself as "absolute owner" of the said lands, and she returned the said annuities of £80 and £100 and the said mortgage of £1050 as charges on the said lands, and described herself as owner of the said mortgage. The agreement for the sale of the said lands had not yet been entered into.

26. In 1900 Henrietta MacDougall and T. H. B. Ruttledge, the original trustees of the will of Henry MacDougall, requested Lord Howth to execute to her a lease of one acre of land, portion of the lands of Censure, Howth, comprised in an existing lease dated the 4th July, 1864, for the term of 150 years, at the rent of £6, for the purposes of building a house thereon, and for the purpose agreed to surrender to Lord Howth one acre of the lands comprised in the said lease.

27. The rent payable under the lease of 1864 was consequently reduced by endorsement thereon, which recited that Henrietta MacDougall alleged that she was entitled to the lessee's interest "as residuary legatee of the late Henry MacDougall."

28. A similar recital appeared in an endorsement upon another lease, dated also the 4th July, 1864, being a lease of another portion of the lands of Censure.

29. By indenture of lease dated the 31st December, 1900, Lord Howth, in pursuance of the said agreement, demised to Henrietta MacDougall part of the lands of Censure, containing one acre, for the term of 150 years, at the rent of £6, and by indenture of under-lease, dated the 3rd December, 1901, Henrietta MacDougall demised to one Margaret Hill the said plot of land for the term of 150 years from the 1st November, 1900, at the rent of £14.

30. Henrietta MacDougall entered into a number of agreements to supply different persons with water from the lands known as the "Bog of Loughs," Howth. In these agreements she was described as "representative of the late Henry MacDougall."

Henrietta Mac Dougall, who, in addition to her interest under the will of her brother, Henry MacDougall, was also entitled in her own right to certain leasehold premises in Dublin, made her will, dated 16th March, 1909, whereby she left her house-property

in Dublin to her mother for life, and after her death to her brother Donald absolutely. She left the charge on the lands of Lowhill or the money payable out of that estate, which she stated produced an income of about £200 a year, to which she was entitled, subject to her mother's life interest to her brother, Ronald, absolutely, and subject to the payment of her debts, funeral and testamentary expenses, and legacies, she left all the residue of her real and personal estate to her brother Donald.

Henrietta MacDougall died on the 16th March, 1909. By reason of the fact that Donald MacDougall had predeceased the testatrix, there was an intestacy as regards the property so devised and bequeathed to him.

Mrs. Elizabeth MacDougall died on the 14th January, 1911.

Questions had arisen as between the heir-at-law and next-of-kin of Henrietta MacDougall, as to who was now entitled to the real estate remaining unsold devised by the will of Henry MacDougall. The following questions were (*inter alia*) submitted to the Court:—

1. Whether the real estate of the testator Henry MacDougall, or any, and, if so, what part thereof was converted into personal estate under the trusts for sale and provisions of his will?

2. Whether the reversion in fee in the lands of Drumleck was so converted?

3. If it should be held that the said real estate or any part thereof or the reversion in fee in Drumleck was so converted into personal estate, whether, subject to the raising of the moneys raisable under the said trusts for sale, the same, or any, and what part thereof, ought now to be treated as reconverted into real estate by reason of the acts or declarations of Henrietta MacDougall, or by the provisions of her will?

A. C. Newett, for G. V. Hart and Henry Stokes, the trustees of the will of Henry MacDougall.

Ronan, K.C., and *A. V. Matheson*, for Ronald MacDougall, the heir-at-law of Henrietta MacDougall:—

With regard to the trust for sale of the Howth property, what the testator Henry MacDougall intended to be sold was

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an estate in possession. His mother was entitled to a life estate in the leasehold interest in Drumleck, independently of his will, and this was her home, and, therefore, he provided that the sale of the whole was only to take place during her lifetime with her consent. The consent essential to the sale was made necessary by external circumstances. In White and Tudor (1) it is stated that, in the case of a will, conversion will take place from the death of the testator unless it be directed to take place at another time, as, for instance, upon the death of a person entitled for life independently of the will. Accordingly, conversion could not have taken place until after the mother's death—an event which did not occur during Henrietta MacDougall's lifetime; and the heir-at-law of the latter is entitled to take the balance, representing the proceeds of sale of the reversion in fee in Drumleck, as realty. Even if conversion did take place at an earlier date, the balance, under the provisions of the will, would fall into the fund created by the second trust for sale.

With regard to the second trust for sale in Henry MacDougall's will, it is clearly discretionary. The trustees are directed, at their discretion, from time to time to sell the property or any part thereof. The direction does not necessarily exhaust the proceeds of sale; at most, there is no conversion of more of the property than is necessary to pay the charges. A discretion as to the whole or part prevents conversion of the whole: *Wright* v. *Wright* (2).

Assuming, on the other hand, that conversion did take place, there is ample evidence of intention by Henrietta MacDougall to reconvert. There are two classes of cases showing the circumstances under which reconversion will be held to have taken place—(1) the class of cases of which *Mutlow* v. *Bigg* (3) is an example, where the trust for sale cannot be put an end to without the consent of the chargeants on the proceeds of sale; and (2) the class of cases of which *In re Gardiner's Trust* (4) is an instance, where the person entitled to the surplus rents goes into possession, the right of the chargeants on the proceeds of sale is limited to

(1) Ed. 1910, at p. 372.
(2) 16 Ves. 188.
(3) 1 Ch. D. (C. A.) 385.
(4) 1 Eq. Rep. 57.

insisting that the trustees shall provide for their charges, and the person entitled to the balance can show an intention to elect to take the lands, or the balance of the proceeds of sale, as realty. See also *Meek* v. *Devenish* (1) and *In re Potter* (2). The present case comes within the latter class. In Lewin on Trusts (3) it is stated that it is competent for a person entitled to the proceeds of sale of lands, subject to a charge, to elect to take the lands as realty.

The presumption of election may arise from slight circumstances of conduct: *Crabtree* v. *Bramble* (4), *Re Gordon* (5). The positive acts of ownership by Henrietta, with reference to the leasehold property at Howth, and her act in describing herself as "absolute owner" in the Originating Request, lodged for the sale of the Mayo property, afford ample evidence of her intention to elect. Following *Crabtree* v. *Bramble* (4), the Court must take into account the cumulative effect of all the acts and declarations.

D. G. Chaytor, K.C., and *J. E. Walsh*, for Mrs. Stokes, appointed to represent the next-of-kin of Henrietta MacDougall:—

Both the trusts for sale in the will of Henry MacDougall were clearly imperative and effected conversion. The scope and object of the will were that all the property should be realized as soon as possible, and a fund created out of which the various charges were to be paid. The only way the trustees could do this was by a sale.

With reference to the Howth property, the provision that the sale was to be with the consent of testator's mother, if carried out during her lifetime, does not prevent the trust from being imperative. The object of inserting the words "with consent" was to ensure that the act should be done when the consent was given, not to prevent it until consent: *Thornton* v. *Hawley* (6). No doubt testator's mother was entitled to a life estate in the leasehold interest in Drumleck independently of his will, and her consent would have been necessary for an immediate sale of this

(1) 6 Ch. D. 566.
(2) 3 T. L. R. 430.
(3) Ed. 1911, at p. 1233.
(4) 3 Atk. 689.
(5) 6 Ch. D. 531.
(6) 10 Ves. 129.

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interest. But the trust for sale comprised other property in Howth, in which testator's mother had no interest apart from the will, and the sale of the whole could have been carried out at any time without her consent, subject to her life estate in the leasehold interest in Drumleck. Then there is a specific appropriation of the entire proceeds of sale of the Howth property. Any balance that remained would not have fallen into the fund created by the second trust for sale, but was to form part of the residue, and would have gone to Henrietta MacDougall as residuary legatee. Accordingly, all she was entitled to was the balance of the proceeds after sale.

As regards the second trust for sale, the discretion given to the trustees relates only to the time and mode of sale. At most the words amount to an indication that the property should not be immediately converted. Where conversion is directed, the fact that the trustees have a discretion as to time does not alter the general rule: *Doughty* v. *Bull* (1), *In re Raw*; *Morris* v. *Griffiths* (2). The testator then proceeds to appropriate the entire proceeds of sale, referring expressly to "the balance." The estate of William MacDougall had not at the time been wound up. Having regard to the amount of the liabilities affecting the proceeds of sale, it is manifest that the testator never contemplated any part remaining undisposed of. Even assuming that there was, the realty and personalty having been once blended, the undisposed of residue would go to the personal representatives.

On the question of reconversion, as to the reversion in fee in Drumleck, Henrietta MacDougall never became entitled in possession to the proceeds of sale of the Howth property, as she predeceased her mother. She was, accordingly, never in a position to elect: *Meek* v. *Devenish* (3); *Sisson* v. *Giles* (4); see also *In re Daveron*; *Bowen* v. *Churchill* (5). There can be no election by a person whose interest is a limited one, or contingent at the time. All persons having interests must concur to effect reconversion: *Holloway* v. *Radcliffe* (6). She would not have elected to reconvert

(1) 2 P. W. 320.
(2) 26 Ch. D. 60.
(3) 6 Ch. D. 566.
(4) 3 De G. J. & S. 614.
(5) [1893] 3 Ch. D. 421.
(6) 23 Beav. 163.

or to take the balance of the proceeds of sale as realty without the consent of the owner of the £1000 charge. In the events that happened this charge did not become raisable till after her death. Similarly, as regards the Mayo property, Henrietta MacDougall was never in a position to elect without the consent of the chargeants on the proceeds of sale. They were entitled at any time to have the property sold for the purpose of raising their charges: *Davidson* v. *Trimmer* (1) : see also *Walrond* v. *Rosslyn* (2). In *Meek* v. *Devenish* (3), Malins, V.-C., says that "a person absolutely entitled to the produce of real estate has a right to say that he desires to have it in specie, provided the necessary provision is made for charges." The fact that large arrears are due on foot of Henrietta MacDougall's own charge, and Mrs. Watson's annuity, shows that the trustees were never in a position to make such provision. Further, Henrietta MacDougall's own charge of £2500 was not raisable till after her mother's death. It would have been against her interest that a sale should have taken place during her mother's lifetime for the purpose of raising Mrs. Watson's annuity, as the latter would have got priority over her own charge. As regards *In re Gardiner's Trust* (4), upon which the statement in Lewin on Trusts (5) is based, the report is unsatisfactory. It is evident, however, that there all persons interested must have consented to the party who went into possession treating the property as owner.

Lastly, assuming that Henrietta MacDougall was in a position to elect, the Court is not at liberty to take into account acts affecting the property subject to the first trust for sale, as evidence of intention to reconvert the property subject to the second trust for sale, or conversely. All the alleged acts and declarations by Henrietta MacDougall affecting the Howth property relate only to those parts of the property in which she had a chattel interest, and cannot be taken as evidence of intention to reconvert the reversion in fee in Drumleck. As regards the Mayo property, the only act alleged is the statement in the Originating Request that she purported to sell as "absolute owner." For the purpose of any benefit arising from the sale, it was immaterial to her whether

(1) 11 Ch. D. 341.
(2) 11 Ch. D. 640.
(3) 6 Ch. D. at p. 571.
(4) 1 Eq. R. 57.
(5) Ed. 1911 at p. 1233.

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she sold as "absolute owner" or as trustee. The term "absolute owner" in land-purchase proceedings is merely used to describe the character in which the vendor purports to sell, *i.e.*, in contradistinction to "limited owner." The description is not conclusive. The Court cannot take a statement standing by itself in a document which purported to initiate proceedings, the intention of which was to convert, as evidence of intention to reconvert, and retain the property as realty.

E. J. Phelps, for the representatives of Donald MacDougall.

July 24.

BARTON, J.:—

The first question relates to the trust for sale of the reversion in fee of Drumleck. The trustees were to sell "at their discretion at any time after the death of my mother or during her lifetime with her consent." It is not unusual to direct money to be laid out on request of a *cestui que trust*, the object being not to prevent a sale until request, but to ensure that the act shall be done when the request is made. But it is in every case a question of intention. If there are grounds for inferring that the testator's object was to give a discretion to the person or persons whose consent is required, the trust is not imperative, at all events during their lifetime. It was contended that the present is a case of that class, it being admitted that the testator's mother was, under another instrument, and independently of the will, entitled for life to the lease of Drumleck, and Drumleck was her residence and home. There is something to be said for the view that this is a case in which the testator intended to give his mother a discretion; that what was dominant in his mind was that Drumleck was her home, to which she was entitled for life, under another instrument; that the possession and reversion were to be sold together or not at all; and that it was to be at her discretion to say whether they should be sold in her lifetime. However, I do not find it necessary to definitely decide that point. I shall assume that a conversion took place.

Having regard to the decision of Malins, V.-C., in *Meek* v. *Devenish* (1), applied by Chitty, J., in *In re Potter* (2), I am of

(1) 6 Ch. D. 566 (2) 3 T. L. R. 430.

opinion that Henrietta MacDougall was capable of declaring whether she would take the balance devised and bequeathed to her in its unconverted state or not; and the question is, did she do so?

Although the question is material only with reference to the reversion in fee of Drumleck, which was the only part of the property which was real estate, her intention may be inferred from her acts with reference to other parts of the Howth property, the subject of the same trust, which were themselves of chattel tenure. I have come to the conclusion that paragraphs 26 to 29 of Mr. Crookshank's affidavit contain evidence of acts and circumstances which amount to an unequivocal declaration of intention to retain that balance in its unconverted form. [His Lordship read paragraphs 26 to 29.] The matters referred to in paragraph 30 of the same affidavit are not, in my opinion, sufficient to weaken the effect of those acts and circumstances. If I am right in that view of the facts, it follows that Henrietta MacDougall's heir-at-law is entitled to have the reversion in fee of Drumleck treated as real estate, when this balance comes to be distributed. As regards the chargeants, I am of opinion that, in view of all that has happened, it is reasonable to infer that the chargeants assented to the property being retained subject to their charges.

The second question relates to the trust for sale of the other lands. The terms of that trust are peculiar. The testator seems to anticipate that there would be no balance after the charges had been provided for. I shall assume that there was an imperative conversion for all the purposes of the will, and shall at once proceed to deal with the question whether Henrietta elected to take the property in its unconverted state. Did Henrietta MacDougall elect to take these lands as realty, subject to incumbrances? They were insolvent *quâ* income; but I gather from Mr. Crookshank's affidavit that they were solvent *quâ* capital. In her will she did not specifically refer to any of these lands, but she specifically devised her *real* estate, and she had none except the lands devised under this will of Henry MacDougall. The question turns upon the effect to be given to a declaration contained in the Originating Request which she addressed to the Irish Land Commission, for the sale of the estate of Kill and

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Creganagh, in the county of Mayo. In this Originating Request she described herself as the "absolute owner" of the lands. Standing by itself that is an unequivocal statement upon the subject—not a statement of intention to reconvert, because she was purporting to sell and convert into money—but a declaration that she was selling not as trustee for sale with a view to carry out the trust under the will, but as owner of real estate.

It is, however, contended that the special nature of a sale under the Land Purchase Acts renders the statement equivocal, so I propose to examine the provisions of the Land Purchase Act, so far as they are relevant. [His Lordship referred to section 33 of the Land Law (Ireland) Act, 1870; section 34 of the Land Law (Ireland) Act, 1887; the provisions of the Land Purchase Act of 1891; and to section 17 of the Land Purchase (Ireland) Act of 1903, and proceeded.] The form prescribed by the Estates Commissioners' Rule 46 contains a paragraph dealing with the *status* of the vendor. It is to the following effect:—"I am absolute owner of the said estate and lands [*or* I am owner as tenant for life, &c., *or* we are trustees with power of sale of the said lands, as the case may be under settlement dated . . . .]." This statutory form drew attention to the very point. It invited Henrietta MacDougall to declare her intention. Henrietta MacDougall, as landlord, availed herself of this form, and I conclude that she declared that she elected to sell this real estate as absolute owner subject to incumbrances, not as trustee for sale; in other words, that she had elected to hold these lands as real estate subject to incumbrances, and not as a balance of money coming to her after conversion under the will.

Solicitors for the trustees of Henry MacDougall, and the representatives of Donald MacDougall: *Whitney and Moore.*

Solicitors for Ronald MacDougall: *Montgomery & Chaytor.*

Solicitors for Mrs. Stokes: *Stephen Gordon & Son.*

W. M'G.

IN RE EARL OF ERNE'S ESTATE (1).

Appeal.
1911.
Dec. 1, 4.

Congested estate in congested districts county– Sale of holding without consent of Congested Districts Board—Irish Land Act, 1909 (9 *Edw.* 7, *c.* 42), *sect.* 58, *sub-sect.* 2—"*Estate.*"

The prohibition in the Irish Land Act, 1909, sect. 58, sub-sect. 2 (2), of the sale of a congested estate in a congested districts county without the consent of the Congested Districts Board prohibits the sale without such consent of any part of such estate, or any holding thereon, under the Land Purchase Acts or any of them.

The word "estate" in the sub-sect. means land coming within the definition of congested estate in sect. 6, sub-sect. 5, of the Irish Land Act, 1903, as amended by sect. 20, sub-sect. 1, of the Irish Land Act, 1909, and is not restricted to estates declared to be such by the Land Commission or by the Congested Districts Board.

Accordingly, where the owner of a congested estate in a congested districts county entered into agreements with the tenants on part of it for the sale to them of their holdings under the Land Law (Ireland) Act, 1896, and the Land Purchase Acts incorporated therewith, without obtaining the consent of the Congested Districts Board, the Court of Appeal, on the application of the Board, and on their undertaking to send in an offer to purchase the estate within a year, stayed the proceedings for the sale of these holdings.

THE Earl of Erne on the 24th November, 1909, presented to the Irish Land Commission an originating statement under the Land Purchase Acts for sale of certain lands in the county of Mayo,

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

(2) Irish Land Act, 1909, sect. 58 (2):—

"No congested estate situated in a congested districts county shall, after the passing of this Act, be sold under the Land Purchase Acts, to persons other than the Congested Districts Board without the consent of that Board, which consent shall not be withheld unless the Board undertake to enter into an agreement, or to send in a final offer for the purchase of the estate within one year: Provided that this sub-section shall not apply to the case of any sale of a congested estate in pursuance of an originating application or request lodged before the passing of the Act."

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called in the proceedings the Lough Mask Estate, of which he was tenant for life.

On the 31st March, 1910, the said Earl entered into agreements with three of the tenants of the said estate for the sale to them of their holdings in fee-simple under the said Acts. These tenants were Patrick S. Daly, who held 664A. 0R. 23P., Michael Connors, who held 100A. 3R. 12P., and James Connors, who held 89A. 3R. 28P. The total acreage of the holdings so agreed to be sold was 862A. 0R. 3P. The area of the entire estate was 1782A. 3R. 9P., and the residue not included in the three agreements was 608A. 0R. 39P., in the occupation of tenants of small holdings, the largest being 46A. 3R. 29P.; and about a quarter of the estate was held in intermixed plots.

The estate being a congested estate, and Mayo being a congested districts county, the Congested Districts Board applied to Mr. Commissioner Lynch on the 7th April, 1911, pursuant to notice dated 9th March, 1911, for an order that no advance be made under the Land Purchase Acts in respect of the said agreements for sale, and that all proceedings in respect thereof for the sale of the vendor's estate be stayed pending proceedings or steps by the Congested Districts Board for the purchase by them of the said lands for the purposes of their Acts, on the grounds—(1) That the estate being in a congested area the Court should exercise its general jurisdiction to stay proceedings; (2) that the Court has no jurisdiction to sell by reason of section 58 (2) of the Irish Land Act, 1909. Mr. Commissioner Lynch referred the proceedings under the said notice to the Judicial Commissioner for determination. On the 9th May, 1911, the Congested Districts Board by writing under their seal declared the whole of the estate described in the originating statement fit to be regarded as a separate estate for the purposes of the Irish Land Act, 1903, and the Land Purchase Acts. The motion, accordingly, came before Wylie, J., on 27th June, 1911, where it was fully argued by the counsel, who subsequently appeared in the Court of Appeal, and His Lordship being of opinion that section 58 of the Irish Land Act, 1909, did not apply, and that, under the circumstances of the case, the application could not be sustained, refused the order asked for in the notice, and declared the vendor and Patrick S. Daly (one of the purchasing

tenants) entitled to the costs of the application, to be paid by the Congested Districts Board.

The Board appealed.

The Solicitor-General (*Ignatius J. O'Brien, K.C.*) and *J. W. Hynes* (with them *Ronan, K.C.*) for the appellants:—

The word "estate" in section 58, sub-section 2, is used in the popular sense, denoting the physical thing, namely, the lands belonging to the owner in a particular county or district—not in the artificial sense of being lands fit to be declared a separate estate by the Estates Commissioners or by the Congested Districts Board (section 98, sub-section 1, of the Irish Land Act, 1903).

The word "estate" is used in the physical sense in section 40 of the Land Law (Ireland) Act, 1896, and in section 5 of the Act of 1881 with respect to resumption by a landlord.

Up to the Act of 1903 the usual way of selling under the Land Law and Land Purchase Acts was by agreement between the vendor and each individual, and the proceedings in the Court of the Land Commission were commenced by originating statement Rules of March, 1897, Order IV, Appendix, Form 1).

The Irish Land Act, 1903, accomplished fundamental changes in the method of the sale of Irish land by means of advances of public money. In the first two sections the word "estate" occurs, and is to be construed in the sense defined by section 98, sub-section (1), and the proceedings were to be initiated by an originating application or originating request, the request to be used in the case of sales to the Land Commission, and the application in cases of other sales. The forms are given in the appendix to the rules made under the Act, and we are entitled to use the forms under the Act of 1903 in construing the Act of 1909 and the rules and forms thereunder. In the Provisional Rules of 3rd May, 1910, under the Acts of 1903 and 1909 it is provided (Rule 1) that no originating application dealing with land in a congested districts county shall be received unless accompanied by an affidavit that the land included therein is not a congested estate as defined by section 6 of the Act of 1903 and section 20 of the Act of 1909, or does not consist exclusively of one or more congested townlands as defined in the latter section; or, if it is a congested estate, by the consent

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of the Congested Districts Board that the lands may be sold to persons other than the Board.

This case does not come within the exception in the proviso at the end of section 58, sub-section (2), of the Act of 1909, for these proceedings were not commenced by originating application or request. The Court below must have either held that "estate" in the sub-section meant an "estate so declared" under the Act of 1903; or that, if it means the physical entity, the aggregate of land owned by a vendor in a congested county, and being a congested estate, the sub-section only prohibits the sale of the entire estate at one time, and does not forbid the sale of it piecemeal, holding by holding, without the consent of the Board. Such a construction would nullify the scope and effective operation of the section. The Board was created for the purpose of acquiring those congested estates, the economic as well as the uneconomic holdings, with a view to dividing them up so as to give each tenant on the re-distributed area a farm which he can work with profitable results. This would be altogether frustrated if the owner could sell the large holdings to the tenants thereof, who would not be the people for whose benefit the Congested Districts Board legislation was intended, leaving to the Board only worthless holdings which it would be useless for them to acquire.

Serjeant Molony, K.C., and *D. J. O'Brien* for the tenant, P. S. Daly:—

Up to 1903 what the Legislature contemplated as the subject-matter of sale under the Land Purchase Acts was a holding, and not an estate. Starting with the Act of 1896 the form of the originating statement, and the rules relating thereto, show that if a vendor is selling part of a townland only he must include the entire townland, or so much of it as belongs to him. And he may include in the statement other lands held under a common, or a partly common, title, though he has no present intention of selling the same. The thing in connexion with the sale that the Crown had control over was the amount of the advance applied for. The Act of 1903 introduced a different practice. "Estates" are to be sold, and a bonus is to be given to the owners, except in certain cases. But the Act of 1903 preserved the right to sell a

holding to the tenant. The vendor in this case has exercised that right. He lodged his originating statement on the 24th November, 1909. Was it ever intended by section 58 of the Act of 1909 to interfere with vendors who are not selling under the Acts of 1903 and 1909?

In sections 5 and 6 of the Act of 1903 "estate" means declared estate; but all through the Land Code up to 1903 the word "estate" means the aggregate of the holdings which the landlord was selling or was prepared to sell. This is clearly the meaning of "estate" in section 40 of the Act of 1896, section 26, sub-section (1), of the Act of 1881, and section 5 of the Act of 1885. But the Act of 1903 introduced a new meaning to be given to the word "estate." In section 58, sub-section (1), "land" is used in contrast to "estate" in sub-section (2). The restriction on the right of a vendor to sell under the Purchase Acts in the cases of congested estates first appears in this code in sub-sect. (4) of section 6 of the Irish Land Act, 1903. We contend that "estate" in that sub-section must have the same meaning as is given to the same word in sub-section (1). An "estate" can only now be sold on an originating application or on an originating request.

As to the proviso at the close of sub-section (2) of section 58 of the Act of 1909, the proviso must be co-extensive with the enactment.

Macrory (with him *H. Wilson, K.C.*), for the Earl of Erne, supported the tenant's contention.

The Solicitor-General, in reply:—

This case cannot possibly be brought within the proviso. That was directed to saving rights in sales pending at the passing of the Act, in which, if they were not excluded, injustice might be done. [He referred to section 75 of the Irish Land Act, 1903, and sections 20, 43, and 60 of the Irish Land Act, 1909.]

THE LORD CHANCELLOR:— Dec. 4.

This appeal is taken by the Congested Districts Board from an order made by Mr. Justice Wylie, dated the 27th June, 1911. The question raised is one of great importance, and relates to the

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construction to be placed on section 58 (2) of the Irish Land Act, 1909. The Earl of Erne is the owner of a large estate, known as the Lough Mask Estate, in the county of Mayo, a congested districts county, under section 46 (1) of the said Act of 1909. The estate comprises the total area of 1782A. 0R. 9P., and of that as much as 862A. 0R. 3P. are in the possession of three tenants, the remainder being in the occupation of thirty-eight tenants. There is no controversy as to the character of the estate, which is admittedly a congested estate, situated in a congested districts county, within the meaning of the Irish Land Act, 1909. Without the consent of the Congested Districts Board, the three large tenants referred to have entered into, and have lodged with the Land Commission, agreements under the Land Purchase Acts for the purchase from the Earl of Erne of their respective holdings, amounting in the aggregate to 862A. 3R. 9P. The proposed purchases are not intended to be made under the Land Act of 1903 or the Land Act of 1909, but under the Land Purchase Acts, as defined in the Land Law (Ireland) Act, 1896. Nothing as yet has been done towards carrying out the sales, and questions having arisen as to the power of doing so, Mr. Justice Wylie was called upon to decide the matter involved, and on the 27th June, 1911, he made the order, the subject of this appeal. So far as the facts have been related to this Court the only question discussed before the learned Judge—as it was the only question discussed on the appeal—was, whether or not the prohibitive words of section 58 (2) of the Land Act, 1909, were applicable to the contemplated sales. The vendor and the intending purchasers both contend that the section in question did not apply, and maintain that it had operation only in the case of the sale of a congested estate taken as a whole, and not in the case of the sale of individual holdings, forming part of a congested estate. As I understand, the learned Judge accepted the view presented by the respondents, and by his order, now appealed against, declared that the said section 58 (2) was no impediment in the respondents' way. The importance of the decision is manifest, and if it were to stand, it would seriously impair the authority and usefulness of the Congested Districts Board. I do not think it necessary to trace in any detail the history of the Congested Districts Board,

from its original establishment down to the Act of 1909, whereby it was incorporated. The general effect of the statutes dealing with that body is well known to everyone acquainted with the course of our land legislation during the last twenty years, and so is the development of its powers in the control and management of the congested areas in Ireland. These powers were consolidated and were greatly increased by the Act of 1909, and no person studying its provisions in relation to the Congested Districts Board, could fail to perceive the paramount power given to the Board, in the congested districts counties, particularly in reference to the congested estates situated in these counties. The jurisdiction of the Land Commission within these areas was restrained, and was made subordinate to that of the Congested Districts Board. The fundamental powers of the Board were in many ways strengthened to enable them to carry out their main function and purpose, namely, of providing the tenants of uneconomic holdings on congested estates with necessary additional land, or with substituted holdings capable of reasonably maintaining the tenant and his family. It is not necessary to do more than mention the powers of compulsory acquisition of land given to the Board; and section 58 of the Act, which we are now discussing, was, I think, plainly intended to make the Congested Districts Board, with reference to congested estates, masters of the situation within the congested districts counties. The contention of the respondents is, that section 58 (2) in no way affects the sale of individual holdings comprised in a congested estate within a congested districts county. Being asked how far they were prepared to press the contention, the learned counsel for the respondents insisted that, on the sole condition that resort was not had to the provisions of either section 1 or section 6 of the Act of 1903, there was nothing to prevent the sale of the whole of a congested estate, situated in a congested districts county, by selling each holding as a separate independent transaction, under the Land Purchase Acts as defined in the Land Law (Ireland) Act, 1896. In other words, as regards the Lough Mask estate, it would be perfectly open to Lord Erne within the next three months, or even in a lesser time, to arrive at agreements for sale to the remaining thirty-eight tenants upon the estate, under

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conditions similar to those regulating the agreements now in question, and thus by two such steps thereby dispose of his whole estate, admittedly a congested one in a congested districts county, without the consent of the Congested Districts Board or consultation with them. All that, too, was to be done by the aid of public moneys advanced by the Land Commission, and in the face of the positive deliberate prohibition of section 58 (2) of the Act of 1909, ordaining that no congested estate in a congested districts county should be sold without the consent of the Congested Districts Board. That certainly does appear to be a startling construction to place upon the section, and if allowed, it is manifest that the great powers plainly intended to be given by it to the Board would, or might, be reduced to a nullity. It would in the most effective manner defeat the purpose of Parliament. To justify that view Serjeant Molony, K.C., the leading counsel for the respondents, was forced to the argument that the word "estate" in the description "no congested estate" must mean an estate declared as such by the Land Commission, or, though I do not remember him to have said so, by the Congested Districts Board. His contention was, that the word must be taken in the special sense in which it used in section 1 and section 6 of the Act of 1903. He pointed out that it was under that Act that estates were sold as a single subject-matter. I am not going to pursue the last-mentioned point, but I do not think it is accurate. I think, with all respect to him, that Serjeant Molony's construction regarding the meaning of the word "estate" in the opening words of sect. 58 (2) is altogether unfounded. He did not realize that we are dealing with a particular thing, namely, a congested estate, which depends for its existence, not upon a declaration either by the Land Commission or the Congested Districts Board, but on its own special facts, complying with the definition in section 6 (5) of the Land Act, 1903, as amended by section 20 of the Act of 1909. Under that definition you have a congested estate, where the facts conform to the definition—declaration or no declaration. It is with such an estate, admittedly within the terms of the definition, that this appeal is conversant. I do not overlook the special congested estate created by declaration under sub-section 2, or the congested estate constituted by virtue of

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sub-section 3 of section 20 of the Act. I have no doubt that the same considerations which I apply to our actual case govern them as well. For the time being we are dealing with a case admittedly within the actual words of the definition itself. That being so, the prohibition of the sale of a congested estate in a congested districts county, by section 58 (2) of the Land Act of 1909, would appear to prohibit on the face of it the sale of any lands comprised in the estate. The section is not dealing with a single saleable thing, the creature of a declaration (to use that phrase, as Serjeant Molony insists upon it). In such a case it would be a plausible argument, that when you were not dealing with the whole, but only with a part, then you were not dealing with the estate as declared. But here the case is radically different. We are concerned with a large expanse of land, an estate in the ordinary sense and language of the people, so circumstanced, however, in the manner of its occupation as to fall precisely under the statutory definition of a congested estate. The attempt to deal with the part of it in question will defeat, and easily, the plain provisions of the section. In the present instance another set of sales under the Land Purchase Acts will, as I already pointed out, transfer by sale the whole estate from Lord Erne to the tenants; and by that course, if he takes it, Lord Erne will have defeated the obvious intention of Parliament, and deprived the Congested Districts Board of the power of making those adjustments and redistributions in the interest of the general body of the holders, which were the special design of Parliament in constituting the Board. It was, in my judgment, the purpose of the section to prohibit the sales of congested estates in congested districts counties without the consent of the Congested Districts Board, not merely under sections 1 and 6 of the Land Act, 1903, but in any other way that might be devised under the Land Purchase Acts. These Acts are defined in section 66 of the Land Act of 1909, and they include every provision of any previous statute under which sales may be effected by the aid of public money, and whether of estates or of individual holdings. If the prohibition were merely intended to operate against sales under the Act of 1903, very simple words would have made that object plain. That being, in my opinion, the intention of Parliament, the words

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employed are sufficient for the purpose. A prohibition affecting the whole estate affects every part of it. The exemptions made in the proviso can in no way, except as expressly stated, limit the operation of the earlier part of the sub-section. No other question open on the sub-section was raised before us, and I do not express any opinion on any other question that may arise. Finally, I express the view that the argument of hardship in particular cases cannot be allowed to defeat the intentions of the Act. Where any man's interests are affected, provision is made for his equitable treatment.

The appeal accordingly should, in my judgment, be allowed.

Holmes, L.J.:—

The Earl of Erne is the owner in fee-simple of lands in county Mayo, known as the Lough Mask estate. A portion of these lands, containing about 862 acres, consists of the holdings of three tenants who have had fair rents fixed for a second term, and the remainder of the estate, containing about 920 acres, is let to thirty-eight tenants.

There is no controversy that the whole of the Lough Mask estate is a "congested estate" as defined by section 6 of the Irish Land Act, 1903, and section 20 of the Irish Land Act, 1909. On the 31st March, 1910, the Earl of Erne entered into separate agreements with each of the three tenants, such agreements being dependent on the Irish Land Commission advancing the sums of money mentioned therein pursuant to the provisions of the Land Law (Ireland) Act, 1896, and the Acts incorporated therewith.

In these circumstances the Congested Districts Board applied to the Land Commission for an order that no advance be made under the above Acts in respect of the three agreements, and that all proceedings for the sale thereof be stayed, on the grounds—(1) that the estate being in a congested area, the Court should exercise its general jurisdiction to stay proceedings; and (2) that the Court has no jurisdiction to sell by reason of section 58 of the Act of 1909. This application having been heard by Wylie, J., the order asked for was refused, on the ground that section 58 of the Act of 1909 did not apply to the sales proposed to be carried

out by the three agreements. Section 58, sub-section 1, enacts that the Land Commission shall not, after the passing of the Act, enter into an agreement for the purchase of any land situated in a congested districts county, save with the consent of the Congested Districts Board. This provision does not apply to the agreements to purchase in the present case. Although these agreements depend upon advances being made by the Land Commission, that body is not the purchaser. The sales, if carried out, will be sales from Lord Erne to each of the three tenants of his holding; and it is easy to understand why sales of this kind may still be proceeded with in a county like Mayo under the system that existed previous to the Act of 1903.

Sub-section 2 is in one respect more limited, and in another more comprehensive. While it only applies to the sale of a congested estate as distinguished from the sale of any land in a congested districts county, it prohibits the sale of a congested estate under the Land Purchase Acts to persons other than the Congested Districts Board without its consent. Then follows a provision that such consent will not be withheld unless the Board gives a specified undertaking, and there is also a proviso that the sub-section shall not apply in certain cases. The sole question in this appeal is whether this sub-section applies to the sales proposed to be made to the three tenants, and the answer depends upon whether "no congested estate" includes "no part of a congested estate." It has, indeed, been argued that the sub-section only relates to sales in pursuance of an originating application or request—that is to say, sales under sections 1 and 6 of the Act of 1903, because the proviso at the end of the section relates exclusively to such sales. But this construction cannot be supported. The object of the proviso is to prevent the sub-section from being applied to cases where an originating application or request had been lodged before the passing of the Act; but if the intention was to confine the whole sub-section to sales of this character, this would have appeared in the opening sentence. The sales prohibited are sales under the Land Purchase Acts, not under one of those Acts. Therefore, as I have already said the question is, whether the words "no congested estate" include "no part of a congested estate." It is no violent construction to

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hold that the whole includes a part; but it is not necessary to examine the language critically. The great objection to the contention that the sales to the three tenants can be proceeded with notwithstanding this provision is that to so interpret it would nullify the sub-section. If three holdings can be sold, every holding except one on the estate could also be sold. The Congested Districts Board was created and powers conferred on it for amalgamating small holdings, aiding migration and other purposes that one considered beneficial to the very poor agricultural population. This can only be done by enabling the Board to procure land which, taken by itself, would not be properly described as congested; and congested estates, as defined by the Acts, often—indeed, I would say generally—include such land. The Lough Mask estate illustrates this. It comes within the definition of a congested estate, but, in addition to a number of wretched holdings, it includes the three large farms, held at very substantial rents, the subjects of the agreements. It would be repugnant to the manifest policy of the Acts relating to congestion if these holdings could by sale to the tenants under the Land Purchase Acts be withdrawn from the control of the Board, and thus rendered inapplicable for the beneficial purposes to which this legislation is directed. Therefore, whether I look at the language of the sub-section or to the policy which it was intended to promote, I am of opinion that on the Board undertaking to enter into an agreement, or to send a final offer for the purchase of the estate within a year, no proceedings shall be taken for the sale of the holdings until further order.

CHERRY, L.J.:—

The vendor in this case is entitled as tenant for life to a property of 1782 acres in the county of Mayo, which is known as the Lough Mask Estate. The county of Mayo is one of the congested districts counties, and the Congested Districts Board contend that the Earl cannot sell this estate, *or any portion of it*, to the tenants under the provisions of the Land Purchase Acts, without the consent of the Board, which admittedly has not been obtained.

Of the 1782 acres which constitute this Lough Mask Estate

it appears that 862 acres are held by three tenants, each of the holdings being large, and, of course, excluded from the definition of a "congested holding" contained in the 20th section of the Land Act, 1909. The remaining 920 acres are divided into thirty-eight small holdings, most of them coming within the definition of a "congested holding," and many of them being in intermixed plots. It is admitted, or, at all events, not seriously disputed, that the Lough Mask Estate as a whole comes within one or other of the definitions of a "congested estate" contained in the 6th section of the Land Act of 1903, and the 20th section of the Irish Land Act, 1909.

The Earl has entered into agreements for the sale to the three tenants of large holdings on this estate under the earlier Land Purchase Acts; and, adopting the procedure which was followed prior to the passing of the Irish Land Act, 1903, he has lodged an originating statement, with the three agreements, in the Land Commission. The agreements were lodged on the 24th November, 1909. The Irish Land Act of 1909 came into force on the 3rd of December in the same year. The question for our determination is, Do these sales come within the prohibition contained in section 58 (2) of that Act? Wylie, J., has held that they do not. His view is that the prohibition extends only to sales of entire estates, according to the procedure adopted under the Irish Land Acts, 1903 to 1909, and that the sale of individual holdings under the earlier Acts is not touched by it.

In support of this view it is urged that the word "estate" is used in the sub-section in the technical signification given to it by section 98 of the Irish Land Act, 1903, and that the proviso at the end of the sub-section, which refers only to the procedure established under the Act of 1903, by originating application (in the case of sales to tenants directly under section 1) and originating request (in the case of sales to the Land Commission), indicates that the earlier part of the sub-section must be similarly limited. This was the argument mainly relied upon by Serjeant Molony in his able argument on behalf of one of the purchasing tenants.

Now, it is obvious that if this be the true construction of the sub-section, the prohibition contained in it becomes utterly

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worthless. Any landlord who desires to evade it can enter into separate agreements to sell to all or any of his tenants under the earlier Land Purchase Acts, whether these tenants are occupiers of large or "congested" holdings. Such sales, it is urged, inasmuch as they are not made under the Act of 1903, cannot be regarded as the sale of an estate within the meaning of the sub-section. This construction would, indeed, in popular language, drive a coach and four through the Act of Parliament!

I cannot at all adopt this narrow view of the scope of the sub-section. It appears to me that the term "congested estate" as defined by section 6 of the Act of 1903 and section 20 of the Act of 1909 must mean the land itself, the aggregate of holdings owned by one landlord in one locality, whether a declaration has or has not been made by the Estates Commissioners or the Congested Districts Board under the 2nd sub-section of section 20 of the latter Act. The word "estate" is given by the 98th section of the Act of 1903 a technical meaning "unless the context otherwise requires"; and it appears to me that the context in this sub-section does obviously require a different construction. The term "congested estate" has under the two sections I have mentioned a technical signification of its own which is quite independent of any declaration by anybody, and obviously applies to the corporeal thing, the land itself owned by a landlord.

Then, again, the prohibition is of a sale "under the Land Purchase Acts." This term includes all the Acts from that of 1870 onwards. It applies to the Purchase Acts of 1885, 1891, and 1896, just as much as to those of 1903 and 1909. How can it be contended, then, that the prohibition is confined to sales under the Act of 1903 and subsequent Acts? In my opinion the prohibition obviously extends to any sale under any of the Land Purchase Acts of a holding comprised in a congested estate, whether that sale takes place simultaneously with sales of other holdings on the same estate or not. I cannot agree that the proviso at the end of the sub-section is inconsistent with this view. Probably the framers of the Act did not think at all of sales under the earlier Acts, and, therefore, omitted in the proviso a reference to the procedure in such cases;—but the generality of the language

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in the earlier part of the sub-section cannot be limited by this omission.

I have therefore come to the conclusion that the three agreements now in question come within the prohibition of the sub-section, and, as they are admittedly not saved by the proviso at the end of it, though lodged before the passing of the Act, I agree that the stay upon the proceedings applied for by the Congested Districts Board should be granted.

Solicitor for the Congested Districts Board: *John O'Connor.*
Solicitors for vendor: *Macrory & Denroche.*
Solicitor for P. S. Daly: *E. P. O'Flanagan.*

W. G.

Land Judge's Court.
Madden, J.
1911.

Nov. 14.
Dec. 11.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF ROBERT PHELAN, A REGISTERED OWNER OF LAND.

Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *s.* 21—*Registration of judgment mortgages—Duty of registering authority.*

The Registrar of Titles acting pursuant to the Local Registration of Title (Ireland) Act, 1891, is bound to accept the affidavit of a judgment creditor seeking to register a judgment against the interest of an owner of registered land, except only in a case in which the ownership of the lands as stated in the affidavit is, on the face of it, displaced by the register or other documentary evidence connected therewith.

A judgment creditor applied under the Local Registration of Title Act for the registration of a judgment as a burden against the interest of the registered owner of the lands. The registration was objected to by the registered owner on the ground that the lands had been purchased by him as an evicted tenant entitled to the protection afforded by section 11 (2) of the Evicted Tenants (Ireland) Act, 1907.

Held, that it was the duty of the Registrar in his ministerial capacity to enter the judgment as a burden on the lands without prejudice to the right of the registered owner to seek to remove the blot on the title by subsequent proceedings in manner provided by the rules made pursuant to the Local Registration of Title Act.

Madden, J.
1911.

In re PHELAN.

APPEAL from an order of the Registrar of Titles. Robert Phelan was a statutory tenant of the holding of Ballyboy, consisting of 100 acres, prior to April, 1907, when he was evicted therefrom for non-payment of rent. Proceedings were taken under the Evicted Tenants Act, 1907, for the compulsory acquisition of Farraleigh and other evicted lands on the Fairholme estates. On 12th November, 1908, Farraleigh was substituted for Ballyboy by order of the Estates Commissioners, and vested in Robert Phelan on 12th November, 1908. On 5th May, 1909, Robert Phelan was registered as owner of the lands. On 22nd February, 1911, a judgment was recovered in the King's Bench Division of the High Court of Justice in Ireland, at the suit of the National Bank, Limited, against Robert Phelan, for the sum of £564 16*s*. On 28th July, 1911, the Registrar of Titles made an order to the effect that an affidavit of the said judgment be entered as a burden on the said registered lands. The Registrar of Titles in his judgment expressed the view that it would be his duty to register the judgment mortgage, even if the evicted tenant were otherwise entitled to the protection afforded by section 11 (2) of the Evicted Tenants Act.

Robert Phelan appealed against the said order, on the grounds that he was an evicted tenant under the Land Purchase Acts, and that his holding of Farraleigh was a parcel of land purchased by him within the meaning of section 11 of the Evicted Tenants Act.

W. Gibson for the appellant.
Swayne for the National Bank, Limited.

Dec. 11.

MADDEN, J. :—

This case raises an important question as to the functions and duties of the Registrar of Title, under the Local Registration of Title Act and Judgment Mortgage Act, when an affidavit is presented to him for the purpose of converting a judgment into a statutory mortgage. The decision of this question involves a consideration of the provisions of both the statutes which I have mentioned.

The registration of a judgment as a statutory mortgage against the lands of the debtor, under the provisions of 13 & 14 Vict. c. 29, is a proceeding for the purpose of making the lands of the debtor available for payment of the judgment debt. Since the abolition of the writ of elegit, it is the only procedure by which the freehold lands of the debtor can be so made available.

Lands of chattel tenure, seizable under a writ of *fi. fa.*, can be made the subject of a judgment mortgage, and this remedy is resorted to when the object of the creditor is to obtain an immediate specific charge on his debtor's interest in certain specified lands, with a statutory priority as against subsequent dealings, and enforceable by all the remedies available to a mortgagee by deed. A valuable reading on the history and character of this procedure, peculiar to Irish jurisprudence, is contained in the Irish Report of the Registry of Deeds Commission issued in 1879. For the purposes of the present case it is sufficient to state that the registration of a judgment as a mortgage against lands of the debtor is a statutory proceeding *in invitum*, the immediate result of which is to vest in the judgment creditor the estate and interest which the debtor might have, at the date of registration, in the lands specified in an affidavit made for the purpose of registration, with the ultimate result that these lands might be made available for payment of the judgment debt by some of the means which are possessed by a mortgagee by deed.

The conversion of a judgment into a statutory mortgage under the provisions of the Act of 13 & 14 Vict. c. 29, was effected by the registration in the Registry of Deeds of an affidavit filed in the Superior Court in which the judgment was obtained, containing certain specified statements, amongst others a description of the lands intended to be charged. This registration is effected by depositing in the Registry of Deeds an office copy of this affidavit, "and such copy shall be numbered and transcribed, and shall be entered in the books and indexes kept in the said office in like manner as if the same were a memorial of a deed" (section 6). It is the duty of the Registrar of Deeds, when a memorial of a deed is entered, to indorse a certificate on the deed,

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"and therein mention the certain day and time on which such memorial is so entered and registered" (6 Anne, c. 11, s. 7). The registration of a deed is carried out by means of a memorial, which must correspond with the deed in certain statutory requirements. It is the duty of the Registrar to compare the memorial with the deed. If he shall find a discrepancy between the deed and the memorial, in any of the particulars required by the Registry Act, he is bound to reject the memorial and return it to the parties presenting it for registration: *In re Monsell* (1). Subject to this comparison "he receives and puts on the files and in his books whatever is brought him, at the peril of the party bringing it" (*per* Lord Downes, C.J., *Jack* d. *Rennick* v. *Armstrong* (2)).

Where an affidavit is presented to the Registrar for registration as a mortgage, there is no document with which it can be compared, and the observation of Lord Downes applies without qualification. The lands mentioned in the affidavit may have no relation to the judgment debtor, or indeed, may have no existence *in rerum natura*. The statements required by the statute as to residence and occupation may be false in fact. It has been the practice of the Registry of Deeds to accept and register affidavits in apparent conformity with the Judgment Mortgage Act, for what they are worth, without entering into a consideration of whether they comply in all respects with the requirements of the Act, in substance or in form. Any other practice would have led to intolerable results. Priority, always a matter of importance, is essential in a case of a procedure to capture the property of a presumably impecunious judgment debtor. Take the case of the affidavit for registration which was held sufficient by the House of Lords in *Thorp* v. *Browne* (3). If the Registrar of Deeds had acted otherwise than ministerially, he would have rejected this affidavit as insufficient, and he would have been bound to do so, as Smith, M.R., felt bound to do, on the authority of *In re Fitzgerald* (4).

In the case of *Thorp* v. *Browne* (3) the affidavit of the

(1) 5 Ir. Ch. R. 529.
(2) 1 H. & B. 727.
(3) L. R. 2 H. L. 220.
(4) 11 Ir. Ch. R. 278.

judgment creditor was registered as a mortgage in the year 1851. In the year 1864, its validity was questioned, and it was held to be invalid by the Master in Chancery, and the Master of the Rolls, in accordance with the law as it then stood. It was not until 1867 that it was decided by the House of Lords, applying a *benignior interpretatio* to this statute than had been adopted in the earlier decisions, that the registration of this affidavit created a valid statutory mortgage having priority as of the date of registration in 1851. This case illustrates the consequences which would have followed if the Registrar of Deeds had taken upon himself to decide as to the sufficiency of the affidavit. For the affidavit tendered to him was plainly insufficient as the law then stood in 1851.

The action of the Registrar of Deeds, however unavoidable, had the result of flooding the Registry Office with a number of documents many of which were inoperative, owing to defective registration, or from the fact that the judgment debtor had no interest in the specified lands.

The existence of this system was a serious blot on the system of registration of assurances, and created a grave difficulty in the way of establishing a satisfactory system of Registration of Title. Purely legal reforms excite but little interest; and when the Local Registration of Title Act of 1891 was introduced, the judgment law of Ireland remained, in this respect, in the same condition as when it was condemned by the Commissioners of 1879, and the statute was necessarily framed with regard to the system of registration of judgments as mortgages established by the Act of 1850. The 45th section of the Local Registration of Title Act included judgment mortgages among burdens capable of being registered as against registered land. The 21st section enacted that after the date of the registration of any land the registration of the affidavit for the purpose of registering a judgment as a mortgage upon the land should be made in the manner prescribed by rules. The section thus concludes: "Immediately upon such registration all such and the same consequences in all respects shall ensue, and all such and the same rights, powers, and remedies in all respects shall be acquired and possessed by every or any person as would have ensued, or

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been acquired and possessed by, or by reason of, the registration of such affidavit in the Registry of Deeds pursuant to the provisions of the said Acts if this Act had not passed."

The procedure as regards registration of judgment mortgages is now regulated by the Consolidated Orders and Rules made on the 1st of September, 1910. Order IV is conversant with dealings with registered land. Rule 16 relates to judgment mortgages. A certified copy of the statutory affidavit for the purpose of registering the judgment as a mortgage is lodged in the office. Except in a particular state of facts specified in the Rules, to which I shall presently refer, the Registrar has no power to refuse to accept the affidavit. But the register under the Act of 1891, being one of title, not of assurances, the lodgment of the affidavit is followed by the service of a notice in the prescribed form upon the registered owner, who is bound, on an order of the Registrar, to produce the land certificate, so that the proper entry of the judgment mortgage may be noted thereon. The person lodging the affidavit is required to state the folio on the register on which he requires the judgment mortgage to be entered. The 17th Rule, which relates to the registration of burdens against the registered lands, provides: "In the case of a judgment mortgage the concurrence of the registered owner of the lands is not required." Thus, by the Local Registration Act and by the Rules, the rights conferred on a judgment creditor by a proceeding *in invitum* to acquire the position of a statutory mortgagee of his debtor's land are preserved, and, with the exception to which I have referred, the position and duties of the Registrar of Titles are the same as those of the Registrar of Deeds.

The exception to which I have referred is a consequence of the conclusive character of a register of assurances. It is the only instance in which the Registrar can refuse to accept an affidavit. It is limited to a case in which the ownership of the lands as stated in the affidavit is on the face of it displaced by the register or other documentary evidence connected therewith, and it has no application to the present case.

Rule 17 (4) provides a procedure by which a judgment mortgage, improperly registered, can be removed, as a blot on the title, on the application of an interested party. In dealing

with such an application, the Registrar acts judicially; and his decision is subject to appeal. In such a proceeding the validity of the registration, and such a question as has been raised in the present case as to the nature of the interest of the judgment debtor in the registered land, can be called in question. The value of this rule is founded on, and implies, the absence of any authority on the part of the Registrar to consider questions of this kind when the statutory affidavit is lodged with him for registration.

Madden, J. 1911. *In re* PHELAN.

For these reasons I am of opinion that the Registrar was right in the view which he took of his duties under the Judgment Mortgage Act and the Local Registration of Title Act. As to the other questions which were argued before him by the parties interested, I express no opinion.

Solicitor for Robert Phelan: *J. F. Williams.*
Solicitor for the National Bank: *W. H. Dunne.*

D. M. S.

IN THE MATTER OF THE ESTATE OF SIR KILDARE BORROWES, BART. (No. 2) (1).

Appeal. 1911. Dec. 4, 5.

Land purchase—Sale of demesne land with a view to repurchase—Costs of owner of superior interest—Liability of vendor where purchase-money is insufficient to discharge such costs.

The owner of an estate comprising demesne lands sold the estate to the Estates Commissioners under the provisions of the Irish Land Act, 1903, the vendor proposing to repurchase the demesne, part of which was subject to a perpetual rent which had an enhanced value by reason of the covenant for its payment by the predecessor in title of the vendor, who died leaving assets ample to satisfy the covenant. The purchase-money of this portion of the demesne being insufficient to pay in full the redemption price of the rent:—

Held, that the vendor should be ordered personally to pay to the owner of the rent his costs of and incident to the redemption, and of proving his title.

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

In re Borrowes's Estate (No. 2).

Appeal by William Morris Colles from so much of the order of Wylie, J., dated 15th June, 1911, for the redemption of appellant's perpetual rent of £150 yearly as declared him entitled to his costs of and incident to said order with his demand, and from the order of Wylie, J., made on 25th July, 1911, dismissing with costs appellant's objection to the Final Schedule of Incumbrances.

The circumstances under which the rent now vested in the appellant became subject to redemption are fully stated in the report of *In re Borrowes's Estate* (1).

In compliance with the views expressed in the Court of Appeal, the Estates Commissioners heard counsel for Mr. Colles and the vendor as to the price of the portion of the demesne subject to the rent of £150 as stated at [1911] 1 I. R., p. 236, note 1, and by order dated 12th June, 1911, they fixed the price at £2300. By order of Wylie, J., dated 15th June, 1911, the rent of £150 was ordered to be redeemed, and the redemption-price was fixed at £3000, the owner of the rent, the present appellant, being given his costs with his demand. The schedule of incumbrances was divided into two parts, Part I. being the part of the demesne subject to the rent of £150, to cover which £2300 out of the entire purchase-money of the estate was appropriated. The claims in Part I. were—(1) Mr. Colles for redemption-price of rent: (*a*) arrears; (*b*) costs of and incident to the redemption; (2) Trustees for the vendor: the residue (if any). As the fund only reached to pay No. 1 in part, the only ruling of the Judge on this part of the schedule was as to No. 1, "Retain £2300 on deposit receipt to separate credit." In Part II. a substantial residue was shown, amounting to over £8000, which was ordered to be transferred to the vendor's trustees, the vendor being tenant for life of the lands sold.

By his objection the appellant objected to his costs being placed in the schedule in respect of Part I. only, and claimed that they should be paid in the same priority as the vendor's costs.

(1) [1911] 1 I. R. 218, 237.

Conner, K.C., and *Jefferson, K.C.*, for the appellant.

The appellant is entitled to have his costs of redemption, and of making title to the rent, provided for out of the estate generally, or paid by the vendor. This is a compulsory sale. The appellant objected to selling as far as he could. But when this Court held that the Estates Commissioners were justified in proceeding with the purchase of this estate if they saw fit, it was surely intended that the transaction of purchase and sale should be carried out in accordance with the regular and established practice of the Court, existing ever since the decision of Sir Edmund Bewley in *In re Lord Leconfield's Estate* (1), where he applied the principle of *In re Bethlem Hospital* (2) to cases of the redemption of superior interests—a decision of Sir George Jessel, M.R., in 1875, where that learned Judge referred to preceding authorities in England, which he followed, establishing that in cases of compulsory purchase an order may be made by a Court of Equity for payment of costs, although there are no express words authorizing it in the Act which confers the compulsory powers. The principle is thus stated by Sir Edmund Bewley—"Where any discretion exists as to costs, a party whose property is taken compulsorily is entitled to be indemnified against any costs properly and necessarily incurred by him, including the costs of obtaining payment of the purchase-money or compensation awarded in respect of such property"; and he adds—"This right, in my opinion, is founded on principles both just and reasonable." In *In re Chaytor's Settled Estate* (3) it was held under the Settled Land Act, 1882, that the purchase-money of one part of a settled estate could be applied in discharging incumbrances effecting another part. The Settled Land Acts apply to sales under the Land Act, 1903: *Lord Massereene's Estate* (4.) In *In re Lewellin* (5) it was held that extra costs incurred by a tenant for life in defending an action should be paid out of the estate. This case was followed by *In re Smith's Settled Estate* (6), where a

(1) 25 I. L. T. R. 28.
(2) L. R. 19 Eq. 457.
(3) 25 Ch. Div. 651.
(4) 40 I. L. R. 16.
(5) 37 Ch. Div. 317.
(6) [1891] 3 Ch. 6.

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tenant for life was allowed the costs *bona fide* incurred by him in reference to an attempted but unsuccessful sale.

Here under Order XLVI, Rule 1, the Court has full discretion as to giving costs and expenses, and as to the persons by whom, and the funds out of which, the same shall be paid or borne. The learned Judge in the Court below seems to have thought it was out of his power to give the appellant his costs, except with his demand which, in the circumstances of this case, would mean that he was to bear his own costs. But Rule 13 of the Order, which provides for the costs of an owner of a superior interest being paid with his demand, adds "unless the Commissioner shall otherwise direct."

The Attorney-General (*The Right Hon. C. A. O'Connor*), *A. C. Meredith*, *K.C.*, and *R. Grove-White*, for the vendor (Sir Kildare Borrowes).

The only legal claim appellant has is to £2300, which now represents the part of Grangemore out of which his rent issued; and, apart from whatever remedy he may have on the covenant, his only rights are against the lands. Under section 17 of the Act of 1903 Sir Kildare Borrowes, as tenant for life, was entitled to sell either to the tenants or to the Estates Commissioners; and, under section 16, when he sold to the Estates Commissioners, the lands were vested in them discharged from the claims of all persons in respect of superior interests, which as from the date of the vesting order ceased as against the lands and attached to the purchase-money. The vendor of the lands incurs no liability to any person by selling under section 17. Mr. Colles's claim attaches to £2300, and cannot attach to anything else. That is what takes this case out of the general rule. By the general rule of the Court of Chancery, a mortgagor wanting to redeem mortgaged lands had to offer to pay incumbrancers principal, interest, and costs. But when sales took place in the Incumbered Estates Court and Landed Estates Court, a puisne incumbrancer, though in no sense promoting the sale, might have to take part of his demand or, perhaps, might have his charge wiped out altogether. The new Land Code goes a step further, because

proceedings may be instituted by a person who has been six years in receipt of the rents and profits, and may turn out to have no estate at all in the lands. Could such a person be held liable to costs such as these? In Rule 71 under the Landed Estates Court Act, "every incumbrancer shall have, with his demand, his costs properly incurred unless the Judge shall otherwise direct"; and it was the universal practice of the Landed Estates Court only to give incumbrancers their costs in the same priority as their demands, notwithstanding that by section 77 of the Landed Estates Court Act a discretion as to costs was given to the Court as extensive as that given by Order XLVI, Rule 1, to the Land Commissioners, that rule being in terms the same as the 77th section. Yet, though that Court was in full operation until ordinary land-purchase was extinguished by the land legislation in this country, commencing with the Act of 1881, no one ever heard of the petitioner having carriage of the sale of an insolvent estate being held liable for the costs of an incumbrancer whose demand was not reached. The worst that could happen to him would be that his own costs of sale, instead of being paid immediately after payment of the Crown duties, might be only given him in the same priority with his own demand. The cases referred to have no bearing on the question before the Court. The duty of the Land Commission in distributing the purchase-money is defined by section 24, sub-section 1, of the Act of 1903; they are to discharge, redeem, or satisfy such claims as the present out of the purchase-money. The somewhat ruthless manner in which the rights of incumbrancers on lands have been more and more curtailed by the successive Acts which have been passed with respect to the sale of Irish land from 1882 to 1903 is traced very clearly in *Blennerhasset's Estate* (1), especially in the judgment of Cherry, L.J., at p. 27. Some people, especially the sufferers, may describe the effect of this legislation as inequitable, but it is the result of the legislative work of the Parliament of the United Kingdom carried on by successive governments of different political views. These enactments are now the law of the land, and any person coming within their scope is entitled to avail of

(1) [1911] 1 I. R. 16.

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them if it be for his benefit, even to the detriment of others who may have the misfortune to suffer hardship by their application. *In re Bethlem Hospital* (1) turned on section 80 of the Lands Clauses Act: see *per* Jessel, M.R., p. 458. In *Lord Leconfield's Case* (2) there was an ample fund. The other cases cited by the appellants turned on the special provisions of the Settled Land Acts, which have been construed liberally in favour of tenants for life selling, or endeavouring to do so, the *corpus* of the estate; but they give no assistance in the case now before the Court. If an order is made on the vendor to pay these costs, he will be entitled to be recouped out of the remainder of the estate: thus the question really is—can the Court throw the burden of these costs on other lands not subject to the rent?

Dec. 5.

The Lord Chancellor :—

It was admitted in the argument that there is a discretion in the Court to award costs to the owner of the head-rent which is being redeemed in this matter. The circumstances of the case are, I think, exceptional. The owner of the estate has exercised the power under the Land Purchase Acts to sell his demesne to the Land Commission, with the intention of repurchasing it. The result of the proceedings has been that, in the redemption of the head-rent issuing out of the lands, the price has been fixed at the sum of £3000, but only the amount of £2300 is available for the purpose. As I understand the position of the respondent, it is contended that the owner of the head-rent should not merely be content with the sum actually forthcoming, though £700 less than the price fixed, but that he should as well defray out of it the costs incurred by him in connexion with the redemption and in proving his title. We are informed they will amount to fully £100. The question is, how the Court ought, in the circumstances, to exercise its discretion with reference to the costs. The law on the subject, as stated by Bewley, J., in *Lord Leconfield's Estate* (2) appears to be that, in analogy to the practice in cases of compulsory purchase under the Lands Clauses Act, the owner of the superior interest in this case is entitled to be paid the costs in

(1) L. R. 19 Eq. 457. (2) 25 Ir. L. T. R. 28.

controversy in this appeal. The vendor has invoked the aid of the statutory powers, solely, so far as we can see, for his own advantage, and it is only reasonable that he should protect against costs the owner of the head-rent whose interests appear to be so seriously affected. It would be an obvious hardship to impose the costs on Mr. Colles. We think he should be indemnified against them, and we accordingly order that the vendor do pay them.

HOLMES, L.J.:—

The only question which requires decision in this case is, whether Mr. Justice Wylie ought, in the exercise of his judicial discretion, to have made the order as to costs which this Court is now about to make. That he had jurisdiction to make such an order is admitted; and I have no doubt that he ought to have made it. The case is a very exceptional one. I doubt whether any similar case has previously come before the Court. Such a case could only arise under the Irish Land Act, 1903. Under the circumstances which exist it would seem to be of the very essence of injustice, not only to compel Mr. Colles to part with his property for an inadequate purchase-money, but to leave him to pay his own costs of proving title and obtaining payment.

CHERRY, L.J.:—

This case is a very exceptional one. The owner of a demesne by selling it to the Estates Commissioners under the 3rd section of the Land Act, 1903, and repurchasing it himself, is enabled to redeem, at a very low price, a head-rent payable out of part of the demesne. I cannot shut my eyes to the fact that he is both a vendor and a purchaser, and that he is himself getting all the advantages of the sale.

The vendor here is buying by means of an advance of public money. He has set in motion compulsory powers to redeem the head-rent. The costs of such redemption are generally provided for out of the funds in Court, *i.e.* they fall upon the owner of the estate which is being sold. In this case the purchase-money has been apportioned in such a manner that the fund is insufficient

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even to pay the full amount of the redemption-price, so that costs cannot be paid out of it. Is it just and fair that the vendor, under these circumstances, should pay these costs? I think it is.

I had at first some doubt whether the Court had jurisdiction to make an order upon the vendor to pay these costs. But it is not disputed by the vendor's counsel that under Order XLVI, Rule 1, of the Rules of March, 1897, the Court has power to make such order as to payment of costs by the vendor as may be equitable, and it is not alleged that the rule is *ultra vires*. If there is any discretion to be exercised in awarding costs, inasmuch as Sir Kildare Borrowes is the only person benefited by this transaction, I think we should exercise that discretion by ordering him personally to pay the costs.

Solicitor for Mr. Colles: *C. H. Monserrat.*
Solicitors for the vendor: *White & White.*

W. G.

Ross, J. 1911.

June 14, 15, 20.

BELFAST POOR LAW GUARDIANS *v.* LORD MAYOR, ALDERMEN, AND CITIZENS OF BELFAST AND THE COUNTY COUNCILS OF ANTRIM AND DOWN.

Appeal. Dec. 7, 8, 11, 12.

Union comprising county borough and portions of counties—Revaluation of county borough—Mistake in apportionment of Union charges—Liability of contributory bodies—Local Government (Ireland) Act, 1898, sections 47, 65, 80.

The yearly expenses of the Belfast Guardians are payable by the Corporation of Belfast and the County Councils of Antrim and Down, in certain proportions determined by section 65 (2) of the Local Government (Ireland) Act, 1898, upon the prescribed demand by the guardians. On the 15th January, 1908, the guardians transmitted to the Corporation of Belfast, and to each of the said County Councils, an estimate and demand for the then ensuing financial year; but, owing to an error in the mode of apportionment, a sum of £601, which should have been demanded from the said County Councils, was, in fact, demanded from the Corporation. The County Councils duly paid to the guardians the amounts included in the estimates and demands served upon them, but the Corporation refused to pay more than their due apportioned amount of the sum required for expenses by the guardians. On the 14th January, 1910, the guardians transmitted to each of the said bodies an

estimate and demand for the then ensuing financial year, based upon a proper apportionment, and as the said sum of £601 still remained unpaid, the guardians excluded it in estimating their revenue for such ensuing financial year, thereby increasing the total amount required by them to meet their expenses for the said year by £601. The Local Government Board, at the instance of the guardians, made an order on the 23rd March, 1910, extending the time for the two County Councils to pay their respective portions of the said sum of £601, and within such extended time no payment in fact of the said sum having been made, the guardians brought an action against all the said bodies for recovery thereof.

Held, that inasmuch as the liability to pay arose under section 43 of the Local Government Act of 1898, and prior to and independently of the making of an estimate and demand by the guardians under section 51 (1), the guardians were entitled to recover from the County Councils their respective portions of the said sum of £601, notwithstanding the lapse of time, and that no demand therefore had ever been transmitted to them.

TRIAL OF ACTION.

The facts in the case and the material sections of the Local Government Act, 1898, sufficiently appear in the extracts from the pleadings and in the judgment of Ross, J.

The plaintiffs' statement of claim (omitting certain paragraphs not material to the present report) was as follows:—

1. The plaintiffs are the guardians of the poor of the Belfast Poor Law Union, and prior to the date of the passing of the Local Government (Ireland) Act, 1898, it was the business of the plaintiffs, under the provisions of the Poor Relief (Ireland) Acts, to (*inter alia*) make, levy, and collect the poor rate within the said Belfast Poor Law Union. The said union then comprised and still comprises the County Borough of Belfast, part of the county of Antrim now known as the Belfast Rural District, and parts of the county of Down now known as the Castlereagh Rural District and Holywood Urban District.

2. Under and by virtue of the provisions of sections 6 and 21 of the said Local Government (Ireland) Act, 1898, the business of the plaintiffs with respect to the making, levying, and collecting the poor rate within the said union, was transferred as to that portion of said union situate in the County Borough of Belfast, to the defendants, the Lord Mayor, aldermen, and citizens of the city of Belfast, who, acting by the council (hereinafter referred to as the

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Belfast Corporation), have all the powers and duties of a county council, and as to that portion of said union situate in the county of Antrim, to the defendants, the County Council of Antrim, and as to the portions of said union situate in the county of Down, to the defendants, the County Council of Down.

3. By section 43 of the Local Government (Ireland) Act, 1898, it is provided that where a union is divided between more than one county the total amount to be raised over the union shall be apportioned between each divided part in proportion to rateable value, and the amount so apportioned to a divided part, shall be raised equally over that part as if it were a separate union.

4. By section 65, sub-section (1), of said Act, it is provided that a general revaluation of rateable hereditaments under the Valuation Acts may be made as respects a county borough on the application of the council, and by sub-section (2) of said section 65, where part of a union is within, and part without, any county borough in respect of which a revaluation is made under this section, the total amount to be raised for union charges in that union shall be apportioned between each such part of the union, in proportion to the rateable value of each part at the date when the revaluation under this section came into force.

5. The Belfast Corporation, pursuant to the power conferred on them, by said section 65, sub-section (1), duly applied for a general revaluation of rateable hereditaments within the said County Borough of Belfast, and said general revaluation was duly made, and came into force on the 2nd day of June, 1905.

6. The Belfast Poor Law Union being divided between the County Borough of Belfast and the counties of Antrim and Down as aforesaid, the total amount to be raised for union charges over said union became from and after the date of the passing of said Act, and until the 2nd day of June, 1905, apportionable in accordance with the provisions of section 43 of said Act, between each divided part of said union, *i.e.*, between the County Borough of Belfast, the Belfast Rural District, and the Castlereagh Rural and Holywood Urban Districts combined, in proportion to rateable value, but from and after the said 2nd day of June, 1905, the date when the general revaluation of the County Borough of Belfast came into force as aforesaid, the provisions of said section 43, as to

the apportionment of the amount to be raised for union charges in said union, ceased to apply, and said amount became apportionable in accordance with the provisions of said section 65, sub-section (2), of said Act, between each part of said union, *i.e.*, between the County Borough of Belfast, the Belfast Rural District, and the Castlereagh Rural and Holywood Urban Districts combined, in proportion to the rateable value of each part at the date when the said revaluation came into force.

7. By section 51 of the Local Government (Ireland) Act, 1898, it is provided that the money required to meet the expenses of a board of guardians shall be supplied by the county council on the prescribed demand by the board of guardians.

8. Under the provisions of the County Councils Order, 1899, as amended by the County Councils No. 2 Order, 1899, which said order, as so amended, remained in force until repealed by the Public Bodies Order, 1904, it was the duty of a board of guardians on or before the 31st day of January in every financial year; and from and after such repeal, under the provisions of the Union Accounts Order, 1905, it was the duty of the board of guardians, on or before the 15th day of January in every financial year, to transmit to each of the county councils for the respective counties in which their union is situate, an estimate and demand in the form prescribed in the schedule to said Order, showing the estimated liabilities and expenditure, and the estimated revenue, of the board of guardians for the next ensuing financial year, together with a calculation of the sums required to meet the expenses of the board of guardians during the said financial year, and the apportionment thereof to each of the said counties respectively, and a demand that the respective amounts so apportioned to each of the said county councils respectively should be supplied to the board of guardians by each of the said county councils respectively, by four quarterly payments at times and in manner therein provided.

9. From and after the passing of said Act, and down to and including the 31st day of January, 1905, the plaintiffs duly furnished every year to each of the defendants an estimate and demand in pursuance of said County Councils Order, 1899, as

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amended by said County Councils No. 2 Order, 1899, and thereby demanded to be supplied by each of the defendants with the respective amounts therein apportioned to each of them respectively.

10. In each of the said years mentioned in the preceding paragraph, the said apportionment among the defendants of the amount required by the plaintiffs, as mentioned in said estimate and demand, was duly made in accordance with the provisions of said section 43, and each of the defendants accepted the said estimate and demand, and duly made and levied a rate to meet the amounts thereby apportioned to them respectively, and duly paid to the plaintiffs the respective amounts demanded from them respectively.

11. On the 13th day of January, 1906, and again on the 15th day of January, 1907, the plaintiffs transmitted to each of the defendants an estimate and demand in pursuance of said Union Accounts Order, 1905, and thereby demanded to be supplied by each of the defendants with the respective amounts therein specified as being apportioned to each of them respectively.

12. Prior to the date upon which the first of the said estimates and demands mentioned in the preceding paragraph was transmitted by the plaintiffs to the defendants, the revaluation of the County Borough of Belfast had come into force, but, through mistake and inadvertence, the said apportionment among the defendants of the amount required by the plaintiffs, as mentioned in said estimates and demands, was in each of said years mentioned in the preceding paragraph made on an erroneous basis—videlicet, in accordance with the provisions of said section 43, and not in accordance with the provisions of said section 65, sub-section (2) (as it ought to have been made).

13. The defendants and each of them accepted the said estimates in paragraph 11, hereof mentioned, and took no objection to same or to the apportionment therein contained, and duly made and levied a rate to meet the amounts thereby apportioned to each of them respectively and duly paid to the plaintiffs the amounts demanded from each of them respectively.

14. On the 15th day of January, 1908, the plaintiffs transmitted to each of the defendants an estimate and demand for the

ensuing financial year, in pursuance of the Union Accounts Order, 1905, and thereby demanded to be supplied by each of the defendants with the respective amounts therein specified as being apportioned to each of them respectively.

15. The said apportionment among the defendants of the amount required by the plaintiffs, as stated in said estimate and demand in the preceding paragraph mentioned, was again through mistake and inadvertence made on an erroneous basis—videlicet, in accordance with the provisions of said section 43, and not in accordance with the provisions of said section 65, sub-section (2) (as it ought to have been made).

16. The defendants, the County Council of Antrim and the County Council of Down, and each of them accepted the said estimate and demand in paragraph 14 hereof mentioned, and took no objection to same or to the apportionment therein contained, and treating the said estimate and demand and the apportionment therein contained as valid, each of them duly made and levied a rate to meet the amounts thereby apportioned to and demanded from each of them respectively, and duly paid to the plaintiffs the full amounts so apportioned to and demanded from each of them respectively by said estimate and demand.

17. The defendants, the Belfast Corporation, also accepted the said estimate and demand in paragraph 14 hereof mentioned, and took no objection to same or to the apportionment therein contained, and treating the said estimate and demand and the apportionment therein contained as valid, duly made and levied a rate to meet the amount apportioned to and demanded from them, and duly collected the full amount of said rate, and in pursuance of said demand duly paid to the plaintiffs the full amount of the first three quarterly instalments of the amount so apportioned to and demanded from them by said estimate and demand as and when the said instalments became due and payable.

18. On the 15th day of January, 1909, the plaintiffs transmitted to each of the defendants an estimate and demand for the then ensuing financial year ending the 31st day of March, 1910, in pursuance of the Union Accounts Order, 1905, and thereby demanded to be supplied by each of the defendants with the

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respective amounts therein specified as being apportioned to each of them respectively.

19. The said apportionment among the defendants of the amount required by the plaintiffs as stated in said estimate and demand in the preceding paragraph mentioned was again through mistake and inadvertence made on an erroneous basis—videlicet, in accordance with the provisions of said section 43 and not in accordance with the provisions of said section 65, sub-section (2) (as it ought to have been made).

20. The defendants, the County Council of Antrim and County Council of Down, accepted the said estimate and demand in the preceding paragraph mentioned, and took no objection to same or to the apportionment therein contained, and treating the said estimate and demand, and the apportionment therein contained as valid, each of them duly made and levied a rate to meet the amounts thereby apportioned to and demanded from each of them respectively, and duly paid to the plaintiffs the full amounts so apportioned to and demanded from each of them respectively.

21. The defendants, the Belfast Corporation, by a letter dated the 2nd day of February, 1909, refused to accept the said estimate and demand or to treat the same and the apportionment therein contained as valid, and the said defendants, the Belfast Corporation, then for the first time objected to the basis on which the apportionment among the defendants of the total amount required by the plaintiffs as stated in said estimate and demand had been made, and contended that in all the said estimates and demands from the 13th day of January, 1906, the said apportionment among the defendants had been made on an erroneous basis, and that same should have been made in accordance with the provisions of said section 65, sub-section (2), and that they were only liable to contribute towards the total amount required by the plaintiffs as mentioned in said estimate and demand in proportion to the rateable value of the city of Belfast, immediately after the said revaluation of the said city came into force.

25. On the 31st day of March, 1909, the sum of £19,430 15*s.*, being the fourth and final quarterly instalment of the amount apportioned to and demanded from the said defendants, the

Belfast Corporation, by said estimate and demand of 15th January, 1908, was due and payable by the said defendants to the plaintiffs, but the said defendants refused to pay the entire of said instalment, and claimed to retain, and did retain, out of said intalment two sums of £829 15*s.* and £601, making together the sum of £1,430 15*s.* The said sum of £829 15*s.* represented the amounts demanded from and paid by the said defendants in pursuance of the said estimates and demands of the 13th day of January, 1906, and the 15th day of January, 1907, respectively, in excess of the amounts which ought to have been demanded from and paid by them if said respective estimates and demands had been made on the proper basis—that is to say, in accordance with the provisions of said section 65, sub-section (2); and the said sum of £601 represented the amount demanded from the said defendants, under said estimate and demand of the 15th day of January, 1908, in excess of the amount which ought to have been demanded from them if such estimate and demand had been made on the proper basis—that is to say, in accordance with the provisions of said section 65, sub-section (2).

26. The plaintiffs and the said defendants, the Belfast Corporation, were unable to agree as to the true construction and effect of said section 65, sub-section (2), and the basis on which the apportionment among the defendants of the total amount required by the plaintiffs as specified in their estimate and demand should be made under the provisions of said section, the plaintiffs contending that such apportionment should be made among the defendants in proportion to the rateable value of the County Borough of Belfast immediately after the revaluation of said city came into force, while the Belfast Corporation contended that such apportionment should be made among the defendants in proportion to the rateable value of said county borough immediately before the revaluation thereof came into force, and for the purpose of determining the said dispute, and ascertaining the true basis on which said apportionment should be made, the plaintiffs on the 28th day of May, 1909, caused a writ to be issued out of the King's Bench Division of the High Court of Justice in Ireland (1909, Record No. 6675).

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28. On the 17th day of June, 1909, the Court made an order declaring that upon the true construction of said section 65, subsection (2), of the Local Government (Ireland) Act, 1898, the Union charges for the year ending 31st March, 1910, were not apportionable between each part of the union in proportion to the rateable value of the City of Belfast according to the revaluation of the 1st June, 1905, and the rateable values of the respective county portions of the union according to the valuations in force at the said date, and the Court was further of opinion that the said charges were apportionable in proportion to the rateable value of the City of Belfast according to the valuation in force immediately *before* the said revaluation came into force, and the rateable value of the respective county portions of the union according to the valuations in force at the same date. On 11th February, 1910, the Court of Appeal affirmed the said order (1).

31. By orders of the Local Government Board for Ireland respectively made under their seal on the 26th day of October, 1909, pursuant to the powers vested in them by the Local Government (Ireland) Act, 1898, the said Board varied and amended the said Union Accounts Order, 1905, so far as same related to the estimate and demand to be transmitted by the plaintiffs to the defendants for the financial year ending the 31st day of March, 1910, and thereby gave power to the plaintiffs, notwithstanding that the time mentioned in said Union Accounts Order, had expired to make and furnish to each of the defendants an amended estimate and demand on or before the 1st December, 1909, apportioning among the defendants the total amount required by the plaintiffs for the said financial year, in accordance with the principle of apportionment laid down by the said order of the King's Bench Division of the 17th day of June, 1909.

32. In pursuance of said order of the Local Government Board mentioned in the last preceding paragraph, the plaintiffs on the 16th day of November, 1909, duly transmitted to each of the defendants an amended estimate and demand, and thereby demanded to be supplied by each of the defendants with the respective amounts therein specified as being apportioned to

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each of them respectively, such apportionment among the defendants being made in accordance with the principle of apportionment laid down by the said order of the King's Bench Division, of the 17th day of June, 1909, and each of the defendants accepted the said amended estimate and demand, and duly paid to the plaintiffs the respective amounts thereby demanded from them respectively.

33. The plaintiffs having from time to time made repeated application to the said defendants, the Belfast Corporation, for payment of the said sum of £1430 15*s.* retained by the said defendants as in paragraph 25 hereof mentioned, the said defendants on the 19th day of October, 1909, paid to the plaintiffs the said sum of £829 15*s.* 0*d.*, mentioned in said paragraph 25 (being portion of said sum of £1430 15*s.*), but they refused and still refuse to pay to the plaintiffs the said sum of £601 mentioned in said paragraph (being the balance of said sum of £1430 15*s.*), or any part thereof, and the said sum of £601 has not been paid to the plaintiffs by any of the defendants.

34. On the 14th day of January, 1910, the plaintiffs duly transmitted to each of the defendants an estimate and demand for the ensuing financial year, ending the 31st day of March, 1911, in pursuance of the Union Accounts Order, 1905, and thereby demanded to be supplied by each of the defendants with the respective amounts therein specified as being apportioned to each of them respectively, such apportionment being made among the defendants in accordance with the provisions of said section 65, sub-section (2), as construed by said Order of the King's Bench Division of 17th June, 1909.

35. At the date of furnishing the said estimate and demand mentioned in the preceding paragraph, the said sum of £601 remained (and same still remains) unpaid, and as the said defendants denied all liability in respect of said sum and same had not, nor had any part thereof, been demanded from the other defendants or either of them in the demand transmitted to them by the plaintiffs on the 14th January, 1908, the plaintiffs acting under advice excluded the said sum of £601 in estimating their revenue for the financial year ending 31st March, 1911, and thereby the total amount required by them to meet their

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expenses for the said financial year was increased by the said sum of £601.

36. The defendants, the County Council of the County of Antrim and the County Council of the County of Down, have accepted the said estimate and demand, and have made no objection thereto, or to the apportionment therein contained, and have duly made and levied a rate to meet the amounts thereby apportioned to and demanded from each of them respectively; but the defendants, the Belfast Corporation, have refused to accept the said estimate and demand, or to treat the same or the apportionment therein contained as valid by reason of the exclusion of the said sum of £601, in calculating the estimated revenue of the plaintiffs for the financial year ending 31st March, 1911, and the consequent increase in the total amount demanded by the plaintiffs to meet their expenses for the said financial year, and in the amount apportioned to and demanded from the said defendants.

37. The said sum of £601 is required by the plaintiffs for the relief of the poor in the Belfast Union, and under the provisions of said section 51 of the Local Government (Ireland) Act, 1898, the defendants, or some or one of them, are bound to supply the said sum to the plaintiffs; and as difficulties have arisen in determining the respective liabilities of the defendants in respect of said sum, and the defendants are not agreed as to same, the plaintiffs have been obliged to bring this action for the purpose of determining the respective liabilities of the several defendants in respect of said sum.

The plaintiffs claimed—

(1) A declaration that the estimate and demand transmitted by the plaintiffs to each of the defendants on the 14th day of January, 1910, is a valid estimate and demand, duly made in accordance with the provisions of the Local Government (Ireland) Act, 1898, and the Union Accounts Order, 1905, and that the respective amounts thereby apportioned to and demanded from each of the defendants were duly apportioned to and demanded from the said defendants respectively in accordance with the provisions of the said statute and Order, and that each of the defendants is liable to pay

to the plaintiffs the respective amounts thereby demanded from each of them respectively.

In the alternative—

(2) A declaration that the total amount demanded by the said estimate and demand should be reduced by the sum of £601; and

(*a*) That the defendants, the Lord Mayor, Aldermen, and citizens of the City of Belfast, are liable to pay the plaintiffs the entire of the said sum of £601; or

(*b*) In the alternative that the defendants, the County Council of Antrim and the County Council of Down, are liable to pay to the plaintiffs the entire of the said sum, each of the said defendants contributing towards the payment thereof in proportion to the respective rateable values of the Belfast Rural District, and the Castlereagh Rural and Holywood Urban Districts combined, immediately prior to the 1st day of June, 1905.

(*c*) Claimed to be entitled to said sum in either alternative.

The defendants, the Corporation of Belfast, pleaded that the estimate and demand of the 14th January, 1910, was invalid, in so far as it purported to apportion any part of the sum of £601 upon them or to demand the same from them; that they were not liable for any portion of the same, and that the defendants, the county councils, were liable to pay the entire of the said sum to the plaintiffs.

The defendants, the County Council of Antrim, by their defence submitted that it was the duty of the plaintiffs, in pursuance of the statutes and orders enacted in that behalf, to make a proper estimate at the commencement of each year of the sum of money necessary for the service of the said union for the said year, and to apportion the said sum among the various parts of the said union in accordance with the statutes and Orders in that case made and provided, and the only duty upon the defendants was to pay the amount so apportioned on them upon the prescribed

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demand note, and that prior to and since the re-valuation referred to in the statement of claim, various demand notes have been served upon them and were accepted and rates struck for the payment thereof as they were in law bound to do, and the only demand note served upon them in respect of the year 1910–1911 was that referred to in paragraph 34 of the statement of claim, and on the receipt of the demand note in respect of same, they struck the necessary rate to raise the amount so demanded for the said year, and have received no other demand note.

The defendants, the County Council of Down, put in a similar defence.

S. L. Brown, K.C., G. W. Walker, K.C., and *J. M. Whittaker,* for the plaintiffs.

Ronan, K.C., Gordon, K.C., R. F. Harrison, K.C., and *Overend,* for the Belfast Corporation.

H. Wilson, K.C., and *Hanna, K.C.,* for the County Council of Antrim.

D. M. Wilson, K.C., and *James Andrews,* for the County Council of Down.

June 20.

Ross, J. :—

In this case the plaintiffs apply for relief, under circumstances which I shall presently state, in the alternative or jointly against three sets of defendants: the Belfast Corporation, the County Council of Antrim, and the County Council of Down.

The union comprises the city of Belfast and portions of the counties of Antrim and Down. The 43rd section of the Local Government Act of 1898 provides that in a union of this kind the total amount of the expenses to be raised is to be apportioned between each divided part in proportion to the rateable value, and the amount so apportioned to a divided part is to be raised equally over that part as if it were a separate union.

A general re-valuation of the County Borough of Belfast was duly made and came into force on the 2nd of June, 1905. The re-valuation resulted in a substantial increase in the valuation of the city. The valuation of the county portions not being dealt with remained as before.

In consequence the principle of apportionment set forth in section 43 ceased to apply, and the provisions of section 65, sub-section (2), became operative. The material part of this sub-section is to the effect that the total amount is to be apportioned between each such part of the union, in proportion to the rateable value of each part, at the date when the re-valuation under this section came into force.

This section is very ambiguous. The word "at" might mean *after* the re-valuation came into force, or before the re-valuation came into force. All the public bodies concerned at first interpreted the section as if the word "at" meant "after." Payments were made on this basis. Litigation arose between the parties, which ended in an order of the Court of Appeal, dated the 11th February, 1910, affirming an order of the King's Bench Division (1). The judgment simply decides on a case stated that the word "at" is to be construed "before."

This decision is binding upon all parties and upon this Court. Now the result of the mistake was this, that the Belfast Corporation had paid a considerable sum in excess of what they would have been obliged to pay if the Act had been applied according to interpretation of the Court of Appeal. Portion of this overpayment having been paid in mistake of law, they were unable to deduct, but in respect of a sum of £601 erroneously apportioned in respect of the financial year ending 31st March, 1909, they refuse payment.

It cannot be contended that the money is not part of the legitimate expenses of the union, and it must be paid by somebody. We have now before the Court the three contributory bodies. The law is now settled, and each of the three bodies is bound by the decision. This Court is, therefore, bound to ascertain which of them is to pay it, and how much each is to pay.

For the counties it is contended that the ratepayers now may not be the same ratepayers who were liable in the year ending 31st March, 1909. For the Corporation it is contended that on the law as declared neither the Corporation nor its ratepayers

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could have been liable to contribute to the extent of a single sixpence.

It is plain the Corporation can only be made liable in one event, namely, in case the £601 is proved to be irrecoverable. To arrive at the conclusion that the sum is irrecoverable, I am required to speculate upon the probable action of the Local Government Board, and to foresee the probable result of application for writs of *certiorari* to the King's Bench Division. I refuse to enter upon any such speculation, and I cannot pronounce the sum irrecoverable. Therefore, the action against the Corporation of Belfast entirely fails.

Now we come to consider the position of the counties. Mr. Herbert Wilson and Mr. Andrews, in their able arguments, have shown that under normal conditions under the statute, under the Public Bodies Order, and under the Union Accounts Order, it is impossible for them to now levy and raise moneys for the payment of the £601, and contend that it is, therefore, irrecoverable. I say "under normal circumstances." For the protection of the ratepayers they are bound to proceed according to these Orders which have the force of a statute, save where they are *ultra vires*.

But there is something pre-supposed and underlying these Orders and Rules. All these corporate bodies may incur liability to members of the public whom they have injured, or to other public bodies with whom they are associated, and if a Court of competent jurisdiction pronounces a judgment or decree involving the payment of money, that judgment or decree must be satisfied out of the corporate funds. This liability may fall upon those who were not directly or indirectly liable at the time when the liability was incurred; but it is one of the incidents of their corporate constitution, and if it were not so the legal rights of the public would be interfered with.

Even if the statute made no provision for the satisfaction of such judgments and decrees, the ordinary law must prevail, and any moneys coming into the hands of these local bodies will be seized upon by the Court to answer the judgment or decree. When liability has once been incurred, there is no condition precedent that can hold up the suit or action.

Such possibilities are distinctly recognized in the statute and in the Orders themselves. Under section 80, sub-section (1), where a payment of money is required to meet a judgment or decree of a competent Court, the treasurer of the council is compellable to pay the same out of moneys under his control as such treasurer, and if these are insufficient out of the first moneys coming under his control as treasurer in like manner as it might be enforced against the council. The treasurer is not to wait for a resolution of the council authorizing him to pay: see Article 13 of the Public Bodies Order, 1904. The imperative power of the judgment takes no account of the action of the council, and must be satisfied out of any moneys in the treasurer's hands.

Again we turn to section 47, sub-section (3): "In the county fund separate accounts shall be kept of all receipts and payments in respect of county at large, union, urban, and district charges respectively, and if the moneys standing to the county fund on account of any of these charges are insufficient to meet the sums payable in respect thereof, including the sums required to reimburse the treasurer for sums by law payable by him thereout, the county council shall raise the deficiency in manner provided by this Act by means of the poor-rate, and the poor-rate shall be levied where the deficiency is in respect of union, urban, or district charges off the union or district as the case requires."

In Article 34 of the Union Accounts Order of 1905, in case of an error caused by inadvertence or accident, the auditor may correct the accounts or he may direct that the correction shall be made in the accounts of a subsequent half-year.

Under section 43, the amount apportioned to a divided part shall be raised equally over that part, as if it were a separate union. This clause must be taken to apply to a case where the method of apportionment is affected by the 65th section.

Can there be any doubt about the liability of the county portion? Liability no doubt is one thing; method of enforcing liability is another thing. The entire argument of counsel for the counties was to show that there were conditions and terms that prevented the enforcement of the liability. When the liability takes the form of a judgment of a competent Court, there is

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nothing that can prevent its enforcement. Accordingly I adjudge and declare that the County Council of Antrim and the County Council of Down are bound to pay the plaintiffs the sum of £601, such sum to be paid out of the funds of such portions of the said counties as are included in the Belfast Poor-Law Union, in proportion to their respective rateable values, and I order the costs incurred in this action by the plaintiffs and the Belfast Corporation to be paid by the same defendants and in the same manner.

D. M. S.

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Dec. 7.

The County Councils of Down and Antrim appealed (1).

Herbert Wilson, K.C., D. M. Wilson, K.C., and *Andrews,* for the appellants:—

We contend that the sum of £601 in question cannot be recovered against the County Councils. They have paid all that they were ever asked to pay and which was demanded from them in the prescribed manner. There is no legal liability upon them to pay what was never legally demanded, and the order of Ross, J., was wrong, inasmuch as it assumed such liability. Under section 51 of the Local Government (Ireland) Act, 1898, a "prescribed demand" in accordance with Art. 45 of the Union Accounts Order, 1905, is a condition precedent to payment. Possibly the Union might have applied to the Local Government Board, and obtained an order enabling them to amend their demand notes; but this was not done. Section 51 was amended by section 2 of the Local Government (Ireland) Act, 1900, empowering a County Council to make a poor rate for the whole financial year, and to collect the same in equal moieties, one for each half year; but under sub-section (6) of section 51 of the Act of 1898 the poor rate must be made either immediately prior to, or at the beginning of, the first six months of the financial year, and the second six months of that year, in respect of the service of such first or second six months, as the case may be.

(1) In the Court of Appeal before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Section 47 (2) and Articles 13 and 14 of the Public Bodies Order of 1904 are absolute restrictions on the County Councils as to the payments they can make. Under Article 67 the secretary of each council is required to prepare an estimate of the amounts required during the next ensuing financial year, not later than the 8th February in each year, and under Article 77 each County Council is required to seal and sign a demand on, and transmit the same to, each Urban District Council for the amount to be supplied by them. This code could not be carried out if the order appealed against is allowed to stand, and that order would burden individual ratepayers with rates for which they should not be made liable. Article 3 (*b*) of the Public Bodies Order, 1904, which enables the Local Government Board from time to time to "assent to any departure from such rules and regulations" cannot be relied on by the plaintiffs, for no such order has been made or applied for, and if made it would lead to chaos. Ross, J., considered that after his judgment the treasurer of each council would be bound to pay out of moneys under his control, or the first moneys coming under his control, as treasurer, under section 80 of the Act of 1898; but that judgment cannot create a liability where none existed, and the present case does not come within the provisions of section 80 (1) at all.

S. L. Brown, K.C., G. W. Walker, K.C., and *J. M. Whitaker*, for the plaintiffs:—

The plaintiffs are entitled to this money, either from the Corporation of Belfast or from the County Councils. It is immaterial to them on whom the burden falls; but they are entitled to an effective order, which can be enforced.

Ronan, K.C., Gordon, K.C., R. F. Harrison, K.C., and *Overend*, for the Corporation of Belfast:—

It is clear that the relief asked for in 2 (*a*) of the statement of claim cannot be granted. To compel payment of this sum by the Corporation would be in contravention of section 47 (2) of the Local Government Act of 1898, as such payment would be for a purpose not authorized by the Act. We object equally to a decree in the terms of the first prayer in the claim, as that

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would indirectly compel the Corporation to pay what they could not be compelled to pay directly. The sum of £601 in question ought not to be treated as irrecoverable, and dealt with by the plaintiffs as such, but must be recovered from the bodies liable to pay it, namely, the County Councils. All the defences raised by the County Councils are equally open to the Corporation; but there is this distinction between the defendants, that the Corporation has paid all that was legally demanded from them, or owing by them, whilst the County Councils have paid £601 less than their due amount. After the decision of this Court in *Belfast Poor Law Guardians* v. *Belfast Corporation and others* (1) all the parties, including the County Councils, knew what their position was, and how the apportionment of rates under s. 65 (2) should be made. The division made by the plaintiffs was a nullity, and the County Councils ought to have paid their due apportioned amount of the sum required by the plaintiffs, although exceeding what was demanded, in the same manner as the Corporation paid its due apportioned amount, although less than what was demanded. The estimate for the year made by the plaintiffs was correct, and, once that is arrived at, the statute itself, by section 65 (2), effects the apportionment between the bodies liable to pay. The defence suggested, viz., that under section 51 of the Act the County Councils could only pay upon being served with the prescribed demand, cannot be sustained, and is based upon a misapprehension of their powers and duties under the Act of 1898. The liability to pay arose, prior to the demand, under section 43 of the Act, and section 51 in no way qualified that liability, or implied that no payment could be made unless on demand. If that were so, and the making of a demand note created a liability not previously existing, the demand note could be quashed on *certiorari*, if irregular; but the King's Bench Division has decided that *certiorari* did not lie in respect of these demand notes: see foot-note to *Belfast Corporation* v. *Belfast Poor Law Guardians* (2). Section 51 (1) was enacted merely for the protection of County Councils who had paid money pursuant to demands by District Councils or boards of guardians, and for

(1) [1910] 2 I. R. 534. (2) [1910] 2 I. R. 536.

no other purpose. As the demand note cannot be quashed on *certiorari*, the error that has arisen must be put right in this action or not at all. If we are right in our contention that the liability of the County Councils arose under the statute, and independently of the demand, section 80 of the Act applies in terms, and it is incorrect to say that liability will fall upon districts of the counties not liable under the statute, sect. 47 (3). The Local Government Board has done all that was required of it to enable payment to be made by the proper bodies. They were unwilling to decide the question of liability, and accordingly did not make an order empowering an amended demand note to be made. But the order of the 23rd March, 1910, was not merely an extending order, but one obviously made to allow the County Councils to pay. Otherwise the making of such an order would have been meaningless. This action is not barred by the lapse of time, as it was brought within the extended period. We contend that no further order of the Local Government Board is necessary; but if this Court holds that a demand note must be made prior to payment by the County Councils, there can be no difficulty, once the rights of the parties are ascertained, in the plaintiffs obtaining from the Local Government Board, under Article 3 (*b*) of the Union Accounts Order, leave to make a fresh demand note *Tighe* v. *County Council of Mayo* (1) shows that a demand may be made, and rates struck, in respect of a past period.

H. Wilson, K.C., in reply.

THE LORD CHANCELLOR:— Dec. 12.

Beyond all doubt, if right was done in the financial year April 1st, 1908, to March 31st, 1909, the County Councils of county Antrim and county Down should, between them, have paid the £601 in question in this proceeding. Everyone knows the mistake that was made, and the responsibility for it cannot be taken off the plaintiffs. By an apportionment based on a wrong valuation, the Belfast Corporation were called upon to make a contribution to the plaintiffs' expenses, £601 in excess of their liability, and the demand upon the County Councils was thereby reduced by that

(1) Johnston's Local Government Reports, vol. vi., p. 81.

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amount below the sum due from them. Section 43 of the Local Government Act is the leading section for consideration. Different views of it were presented to the Court; but it seems to me that the reasonable construction to be placed upon it is to hold that the section imposes on the bodies affected by it a direct liability for the amount, indicated by the section itself in the particular cases dealt with in it. The bodies affected in the present case are the Belfast Corporation and the two councils, defendants, and there can be no doubt what the liability of each is. Once the amount of the plaintiffs' expenses was ascertained, the liability fell upon them, as the contributory bodies of the Union, in the proportion definitely fixed by the section. No mistake in the demand made upon these bodies for the purpose of section 51 could, in fact, alter that liability, though, no doubt, it might embarrass the enforcement of it. But the liability itself would remain, and the first conclusion, accordingly, at which I arrive is that there was a statutory liability imposed upon the two councils for their due proportion of the guardians' expenses in the year 1908–1909. That liability, in my judgment, remained unaltered by the defective procedure taken to enforce it, and the real question raised for us is, whether or not, on the facts of the case, the liability can be, at this stage, declared and enforced. The view I have taken of section 43 is, I understand, that which the Lord Chief Baron stated to be his in the *certiorari* proceedings in respect of the improper valuation basis adopted for the demand in 1909–1910, and he distinctly laid it down that, owing to the demand being a mere ministerial as distinct from a judicial act imposing liability, the process of *certiorari* was not applicable to quash it. That was the basis of the Lord Chief Baron's judgment according to the summary read to us.

It is unnecessary to detail all that happened in the attempt to get the money paid by the Belfast Corporation, and I proceed at once to the Local Government Board order, dated March 23rd, 1910. That was an order by which the Local Government Board, pursuant to their powers under the Act of 1898, as amended by the Local Government Act, 1902, section 4, extended the time for the two councils to pay their respective portions of the £601. Criticism has been passed on the form of that order,

and it is said to be merely an extension order, and in mere form that, no doubt, is so. But, to measure its full meaning and effect, the circumstances must be considered, and I fully accept the argument of Mr. Ronan and Mr. Harrison upon the subject. The Local Government Board were well aware of the defect in the demand sent to the councils in January, 1908. They knew the provisions of section 51 of the Act; and unless it was intended by the Board to cure what had happened, as far as it was in their power to do, it would be a fruitless and misleading thing for them to make a mere order of extension of time. They would never have made the order unless it was intended as well to operate as a dispensation by the Board under the authority of Article 3 (*b*) of the Union Account Order, 1905, of the irregularity in the demand made by the guardians on the councils in January, 1908. By the distinct reference to the £601 in respect of the estimate and demand then made by the order, I think the Board must have intended to assent to the demand being treated so as to include the £601, that is, if the councils were ready to pay the amount. I consider that the Board were at the time not merely exercising their authority to extend the time for payment, but meant as well for the purposes of the order to do everything in their power to remove the defect in the original demand. They were acting in the interest and at the instance of the guardians at the time, and on receipt of the Local Government Board order I think the councils were placed in a position in which they were fully entitled to pay the demand. It is quite out of the question that there would in the situation have been any danger whatever, either of a surcharge being attempted or any other objection raised. It was realized throughout by everyone that the real liability rested upon the councils. Even if we were to act on the view presented on the part of the councils, and we were to hold the liability had never yet been put into actual form, and the money had not yet become due, the same result would be accomplished by the Court making a declaration to the effect that the statutory obligation on the councils arising under section 43 was still outstanding, and enabling the plaintiffs with the assistance they would, no doubt, obtain from the Local Government Board, to take the necessary steps to enforce

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it. I know the Local Government Board refused to do anything indicating that they professed to decide the question of liability between the different bodies. That they left to the Court, and I believe I have accurately described the real meaning and effect of what in fact they did.

Accordingly, I think the Court should make a declaration to the effect of paragraph 2 (*b*) and (*c*) in the plaintiffs' claim, subject to the necessary deduction for the amount already paid.

The plaintiffs, we think, should bear the costs of the action before Judge Ross, and the councils should bear the costs of the Corporation in this appeal.

HOLMES, L.J.:—

Although the arguments in this case have necessarily taken a considerable time, I hope to state the reasons for the conclusion I have come to with comparative brevity.

The plaintiff union comprises the county borough of Belfast, part of the county of Antrim, and parts of the county of Down. Since the Local Government (Ireland) Act, 1898, this union has been deprived of the power it previously possessed of making and levying the poor rate within its ambit, and it is obliged to obtain the funds necessary for the performance of its duties from the Belfast Corporation, and the County Councils of Antrim and Down, such sums to be apportioned between each divided part of the union in proportion to rateable value. By section 51 of the Act of 1898, and by certain County Councils orders made pursuant to that statute, it was the duty of the plaintiffs previous to the Union Accounts Order, 1905, on or before the 31st of January, and since the said order on or before the 15th January in every financial year, to transmit to each of the said three bodies that formed the union, an estimate and demand in a prescribed form, showing the estimated liabilities and expenditure, and the estimated revenue of the Board of Guardians for the next ensuing financial year, together with a calculation of the sums required to meet the expenses of the Board of Guardians during such year,

and the apportionment thereof between the Belfast Corporation and the two County Councils, with a demand that the respective amounts so apportioned should be supplied to the Board of Guardians by each of the said bodies, whereupon such bodies were bound to levy from their respective districts the sums so demanded and pay the same to the Guardians. Demands and apportionment were duly made by the plaintiffs down to the 2nd June, 1905 when a general revaluation of the county borough of Belfast came into operation, the result of which, taken in connexion with the Act of 1898, was (as has been since decided) to introduce a new method of apportionment between the three constituent parts of the Belfast Union. The change in the mode of apportionment, however, was not noticed by any of the parties interested; and the method previously in use was adopted in the estimates and demands furnished in 1906 and 1907, which were accepted and paid by the three bodies. No question now arises in relation thereto, as the payments were made from a mistake in law, and could not afterwards be recalled. In January, 1908, the next estimate and demand were presented with the apportionment still made on the erroneous basis. The demand thus made was accepted and paid by the County Councils of Down and Antrim; and no objection was taken by the Corporation of Belfast until the 2nd February, 1909, followed by another objection on the 4th February, 1909, in which the Corporation claimed to have the apportionment made on the basis afterwards held to be true and legal. The Guardians, however, were advised otherwise; and the Corporation applied to the King's Bench Division to have the demand and apportionment quashed by writ of *certiorari*. This proceeding is not mentioned, I think, in the very carefully prepared statement of claim in this action; but it supplies the key which, as far as I am concerned, unlocks the difficulties that have been the subject of discussion. If the demand and apportionment of the Guardians carried with it liability to pay the apportioned sums, the only remedy for an erroneous apportionment would be the writ of *certiorari*; for, on that assumption, the apportionment would be a judicial act. But the King's Bench Division held that *certiorari* did not lie, inasmuch as liability to pay the

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apportioned amounts arose from the statute, and the apportionment by the Guardians was a mere arithmetical calculation; with this I agree. Accordingly the writ of *certiorari* was refused, and the Guardians brought an action against the Corporation in which the question in controversy was finally settled by a declaration that the mode of apportionment claimed by the Corporation was the legal mode.

Now it is admitted that, if the Guardians had sued the Corporation for the sum apportioned on it in 1908, the latter would have had a good defence; and I am also satisfied, if they had sued the County Councils of Down and Antrim for the amount that ought to have been legally apportioned on them, they would have been entitled to judgment on the ground that liability arose from the statute and not from an arithmetical calculation made by the Guardians. In this view of the case I do not think it necessary to consider the effect of the orders of the Local Government Board. I am of opinion that, without any help from that Board, the Guardians could have sued the County Councils for the proper apportionment that ought to have appeared in their demand made in January, 1908, provided the action was brought in time; and I hold that the order of the Local Government Board, extending the time within which the County Councils might pay to the 31st March, 1910, enabled this action to be brought within such extended period.

In one respect I think the form of action has been misconceived.

The plaintiffs were, I presume, advised that they could not maintain an action relating to the sum of £601, mentioned in the statement of claim, unless there had been a demand and apportionment served upon all the defendants; and, accordingly, in preparing their estimates and demand in January, 1910, they dealt with this sum as irrecoverable, and included it in the demand and apportionment for the ensuing year. The effect of this would have been to throw upon the Corporation the sum which it is admitted that body was not bound to pay; and the first declaration asked for, cannot in my opinion be supported. The action, for the reasons I have already stated, ought to have been brought for the portion of the demand made in January, 1908,

which remained unpaid; and as the statement of claim shows that this is the real matter in controversy, the action may be treated on this basis. The judgment of Mr. Justice Ross for £564 is substantially correct, but as the plaintiffs have sought for a declaration and not for judgment for a debt, I prefer to substitute therefor a declaration in the alternative 2 (*b*) and (*c*) asked for in the statement of claim, altering the sum of £601 to £564. I desire to add that there was nothing unreasonable in the action of the County Councils. They paid on every occasion the amount demanded from them, and showed no disposition to escape their legal liabilities. They were placed in a very difficult position; and the litigation in which they have been involved is their misfortune and not their fault.

CHERRY, L.J.;—

I agree. This case has necessarily occupied a good deal of time, and the Court has derived much assistance from the arguments of counsel, but in the end it resolves itself, as Mr. Herbert Wilson in his reply very candidly admitted, into one question, namely—does the liability of the County Councils to pay arise under section 51 (1) of the Local Government Act of 1898, or did it exist prior to the prescribed demand?

I agree with the other members of the Court that section 51 recognizes a previously existing liability, and that such liability is created by the 43rd section. As Holmes, L.J., has pointed out, the apportionment is only a matter of arithmetic; the liability under the 43rd section is to pay the proper amount when apportioned. Sub-section (1) of section 51 only provides the method of formal payment. Its object is to enable the officials to know when to pay, not to create the liability which previously existed under section 43.

After our judgment it will, in my opinion, be the duty of the treasurer of each County Council, under the 80th section, to pay this money, which we now declare the County Councils liable to pay. [His Lordship read the 80th section, and continued.]

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Now payment, in this case, will be required in order to comply with the 43rd section of the Act; it will also be required in order to comply with the judgment of this Court, so that, so far as I can form an opinion, there will be no difficulty, such as has been suggested, in the enforcement of our order. The money is to be paid by the treasurer of each county, and section 47 (3) enables the proper districts to be charged by the respective treasurers, so that the proper amounts will be duly levied upon the ratepayers of such districts of the counties of Down and Antrim.

There was a difficulty suggested as to the levying of rates for payments which ought to have been provided for in a previous year, but that difficulty was entirely met by the case of *Tighe* v. *Mayo County Council* (1), cited by Mr. Harrison. There it was clearly shown that where, through error, money which ought to have been levied in one year was not so levied, it could be raised by a subsequent rate, and, as we all know, the levying of retrospective rates is not uncommon, and, under special circumstances, may be held to be legal.

Even if I am wrong in thinking that the effect of the 80th section is to enable payments to be made now, without the service of a "prescribed demand" under section 51, still no difficulty arises, for I cannot see that the 45th Article of the Union Accounts Order would be a bar in any way to a demand in the prescribed form being now delivered. I read it merely as directory, providing that certain things should be done before a certain date; but if, through inadvertence, the date is allowed to lapse, chaos does not ensue. Frequently where a date passes prior to which a corporation is under an obligation to do certain acts, it has been held that it may legally do them afterwards. I think that the effect of the order of the Local Government Board of the 23rd March, 1910, was to extend the period during which the counties might pay the money, and inferentially the period within which it might be legally demanded. That order clearly implied that the Local Government Board will give whatever facilities

(1) 6 Johnston's Local Government Report, 95.

may be necessary (so far as can legally be done) for the recovery of the money which this Court now decides that the counties are liable to pay, and I can scarcely conceive that the Local Government Board would have made that order—obviously in order to allow this action to be brought—if they were not prepared to give any necessary facilities for the enforcement of the order. Article 3 (*b*) of the Union Accounts Order enables the Board to "assent to any departure from such rules and regulations," and I have no doubt that the Board will give such assent under that clause to the departure from the actual provisions of the Act as they may think necessary in order to give effect to our order. For myself, however, I do not think that any such sanction is required, for the reasons which I have already mentioned.

The Court of Appeal made the following order :—

IT IS ORDERED that the said judgment of the Chancery Division (Right Hon. Mr. Justice Ross), dated the 20th June, 1911, be varied, and as varied do stand as follows, that is to say, the Court doth declare that the Co. Council of Antrim and the Co. Council of Down are liable to pay to the plaintiffs the sum of £564, being the balance remaining unpaid by them of the entire sum of £601 in the statement of claim mentioned, each of the said defendants contributing towards the payment thereof in proportion to the respective rateable values of the Belfast Rural District, and the Castlereagh Rural and Holywood Urban Districts combined, immediately prior to the 1st June, 1905; and doth order and adjudge the same accordingly; and the Court doth further declare that the defendants are respectively liable to pay to the plaintiffs the balance of the amount demanded by the estimate and demand in the pleadings mentioned in proportion to the respective rateable values of the Co. Borough of Belfast, the Belfast Rural District, and the Castlereagh Rural and the Holywood Urban Districts combined, immediately prior to the 1st June, 1905; and doth order and adjudge the same accordingly; and the Court doth further declare that the said sum of £564 is to be raised and paid out of the funds of such portions of the Counties of Antrim and Down respectively as are included in the Belfast Poor Law Union in proportion to their respective rateable values, and doth order and adjudge the same accordingly; and the Court doth order and adjudge that this action do stand dismissed out of Court as against the defendants, the Lord Mayor, &c., of Belfast; and the Court doth order that the plaintiffs do pay to the defendants their respective costs incurred in this action up to and including the said judgment of the 20th June, 1911, when said costs shall have been respectively taxed by the Taxing Master; and doth order that the

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respondents, the plaintiffs, do abide their own costs of this appeal; and the Court doth further order that the appellants, the defendants, the Co. Council of the Co. of Antrim and the Co. Council of the Co. of Down, do pay to the respondents, the Lord Mayor, &c., of the City of Belfast, their costs of this appeal when taxed by the Taxing Master.

Solicitors for the plaintiffs: *William Harper & Son.*
Solicitors for the Corporation of Belfast: *J. M'Cormick.*
Solicitor for the County Council of Antrim: *T. M. Greer.*
Solicitor for the County Council of Down: *B. N. Johnson.*

R. ST. J. C.

SWIFTE *v.* THE ATTORNEY-GENERAL.

Barton, J., 1910.
Mar. 10, 11, 23.

Will—Devise—Perpetuity—Charitable gift—Society for the benefit of animals—Animals useful to man—Cats' home.

A testatrix bequeathed to the Commissioners of Charitable Donations and Bequests £4000, New Consols, "upon trust to apply the income for the exclusive maintenance of the D. Home for Starving and Forsaken Cats .... including the maintenance of the chloroform chamber now existing, or any other painless method of putting an end to cases of hopeless suffering, and the maintenance of the boarding department, but for no other purpose, as the D. Society for the Prevention of Cruelty to Animals are bound, under deed of 27th February, 1888, to provide for rent, taxes, repairs, caretaker's wages, and all other expenditure."

Held, that the bequest in favour of the Home for starving and forsaken cats was a valid charitable gift.

BY her will, dated 9th February, 1905, Miss Mary Alice Swifte, made the following (among other) bequests:—"I bequeath to the Commissioners of Charitable Donations and Bequests for Ireland the sum of £4000, New Consols, now standing in my name in the books of the Bank of Ireland (or such sum as will purchase the sum of £4000 New Consols), upon trust to apply the income and dividends thereof for the exclusive maintenance of the Dublin Home for Starving and Forsaken Cats, at Grand Canal Quay, in the city of Dublin (and by which name I expresssly desire that it shall continue to be known), including the maintenance of the chloroform chamber now existing, or any other painless method of putting an end to cases of hopeless suffering, and the maintenance of the boarding department, but for no other purpose, as the Dublin Society for the Prevention of Cruelty to Animals are bound under a deed dated the 27th of February, 1888, to provide for rent, taxes, repairs, caretaker's wages, and all other expenditure." After various other provisions and bequests testatrix devised and bequeathed the residue of her real and personal estate to her executors and trustees upon trust after payment of her funeral and testamentary expenses and debts to pay the income thereof to Ernest Godwin Swifte for life, and

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after his death to divide the same between her nephews named in the will in equal shares. Testatrix died on the 9th April, 1909, and probate of her will was duly granted to the plaintiffs as executors.

The Dublin Home for Starving and Forsaken Cats was on the same site, comprised in the same lease, and under the same general control as the Home for Lost and Starving Dogs, but it was separately managed. The separate accounts of the Cats' Home, as distinguished from the Dogs' Home, in the report of 1907, showed receipts and expenditure of about £270. The items of expenditure included matron's and assistant secretary's wages, food for the cats, medical fees, medicine and disinfectants, bedding, rescue work, printing, postage and miscellaneous expenses of that kind. The objects of the Cats' Home were stated in the report as follows:—"The primary object of this home is to receive, feed, and shelter cats found starving, lost, deserted, and unclaimed (abandoned often by heartless people in empty houses, areas, &c.) until they can be humanely disposed of. Cats are also taken in as boarders at one shilling, one and sixpence, and two shillings per week, according to requirements; and kittens at sixpence per week each, during the temporary absence of their owners during the summer months' holiday season, &c."

One thousand and seventy-one cats were received into the stray department of the home during the year 1907, and the report stated that the home was not maintained by the Society for the Prevention of Cruelty to Animals, and was a distinct institution from any other. The boarding department of the home was self-supporting. The Society for the Prevention of Cruelty to Animals was originally founded about sixty-five years ago, and recently incorporated, having been previously governed by a Committee elected annually by the subscribers; and in 1884, by resolution, the Committee accepted donations of a sum of money collected by Miss Swifte, and of £500 from Mr. Kennett, "to be held in trust by them for the permanent establishment and maintenance by them of a Dogs' and Cats' Home."

A deed of February 27th, 1888, was executed, to which the parties were the testatrix and three officers of the Dublin Society for the Prevention of Cruelty to Animals. It appeared from the

contents of the deed that the Cats' Home was a twin institution with the Dogs' Home; and that the Home for Starving Dogs and Cats had been recently established under the supervising control and general management of the Society. It had been mainly built and started by the exertions of, and by subscriptions collected by, Miss Swifte, and by £500 contributed by a Mr. Kennett. Mr. Kennett gave his £500 for cats rather than dogs, and insisted upon getting some assurance from the Committee of the Society that cats would be thereafter benefited equally with dogs, and that Miss Swifte should have an equal voice in everything. The Committee of management, by resolution, agreed to accept the money collected by Miss Swifte, and Mr. Kennett's £500, to be held in trust for the permanent establishment and maintenance of a Dogs' and Cats' Home by the Committee of the Society so long as it remained in existence; and the Committee authorized the secretary and treasurer to sign the necessary documents to that effect on behalf of the Committee. In pursuance of that authority the secretaries and the treasurer by this deed of February 27th, 1888, agreed with Miss Swifte (so far as they lawfully could) that, so long as the Society remained in existence, the home should be maintained by the Committee of the Society in accordance with the terms and conditions applicable thereto contained in Mr. Kennett's letter or declaration of trust—in other words, that cats would be benefited in every way equally with dogs, and that Miss Swifte should have an equal voice in everything. Doubts arose as to the meaning of the latter condition, and by an endorsement on the deed, dated 16th July, 1888, it was agreed between the parties to mean that Miss Swifte should have the same voice with regard to the management of the Cats' Home that the Dogs' Home Committee had with regard to the management of the Dogs' Home, both Committees being subject to the General Committee of the Society. The Dogs' and Cats' Home was erected upon grounds held by a trustee for the Society under a lease dated 28th November, 1884, for a term of 99 years at the yearly rent of £30, the lessee being under a covenant to repair.

On 13th December, 1909, the executors issued a summons for the determination of questions and matters in reference to the will of Miss Swifte. The principal question arising for decision

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was "whether the bequest of the sum of £4000 New Consols, to the Commissioners of Charitable Donations and Bequests, was a valid charitable bequest."

Ronan, K.C., Herbert Wilson, K.C., and *Louis Kelly*, for the plaintiffs:—

A gift for purposes, some of which are not charitable, is altogether void: *In re Sidney Hingeston* v. *Sidney* (1); *In re MacDuff* (2); *Commissioners for special purposes of Income Tax* v. *Pemsel* (3).

The gift here is for the "chloroform chamber" and "boarding department," "but for no other purpose whatever," and all other expenditure is to be provided for by the Dublin Society—"as the Society is bound." But the deed of 1888 is not binding now; the condition precedent has not been fulfilled.

The sentence, "as the Dublin Society for Prevention of Cruelty to Animals are bound under deed . . . to provide for rent," &c., is a condition precedent to the bequest; and as the Society are now under no enforceable legal obligation to pay the rent, &c., of these premises, the gift fails. The word "as" is conditional. Besides, the word "including" is to be interpreted as "meaning," and looked on as introducing a complete and full definition of that which was the object of the gift.

This is not a good charitable gift: *Grove* v. *Young Men's Christian Association* (4); *In re Robinson* (5); *MacLaughlin* v. *Campbell* (6); *Webb* v. *Oldfield* (7).

And the words "for no other purpose" refer only to the chloroform chamber and the boarding department, neither of which constitutes a charity. The boarding department is self-supporting. It is really a commercial undertaking. Nor is the gift to the chloroform chamber a charitable gift.

And the gift for these two objects is made dependent, first, on the existence of the Dublin Home for Starving and Forsaken Cats, which has *now* no existence, as it ended with the death of the testatrix; and, secondly, on the fact that the Society were *then* bound to pay the rent, &c., which they are not *now* bound to pay.

(1) [1908] 1 Ch. 488.
(2) [1896] 2 Ch. 451.
(3) [1891] App. Cas. 531, 583.
(4) 88 L. T. N. S. 696.
(5) [1892] 1 Ch. 95.
(6) [1906] 1 Ir. R. 588, 595.
(7) [1898] 1 Ir. R. 431, 440.

Jellett, K.C., Walker, K.C., and *Patton*, for the Society for Prevention of Cruelty to Animals:—

The argument of the other side is unsound, because in order to bring the principle they contend for within legal rules they must do violence not once, but twice, to the English language. The word "as" cannot import a condition precedent, nor can the word "including" be interpreted as "meaning," or construed as introducing a complete and exhaustive definition of those matters which are the objects of the gift. There is a bequest, on the construction of this will, for the purpose of the amelioration of the lot of quadrupeds useful to man. Such a bequest is a good charitable gift: *University of London* v. *Yarrow* (1). A "Home for Lost Dogs" is a charity within the principle of that decision. In *In re Douglas*; *Obert* v. *Barrow* (2), where a testatrix gave legacies to several charities and societies, among others to the "Home for Lost Dogs," it appeared to the Court, though not necessary for the decision of the case, that a bequest to the "Home for Lost Dogs" was a charity within the statute of 43 Eliz. c. 4.

Dudley White, K.C., and *John Linehan*, for the Attorney-General, cited *Armstrong* v. *Reeves* (3); *Re Vallance* (4). If an overriding charitable intention is shown, it is immaterial that some of the particular objects named would not, if taken without the context, be charitable.

T. Henry Maxwell, for the Commissioners for Charitable Donations and Bequests, cited Tudor (1906), p. 90, and *Hunter* v. *Att.-Gen.* (5).

BARTON, J.:—

Mar. 23.

The question for decision is, whether this bequest of £4000 Consols to the Commissioners of Charitable Donations and Bequests, upon trust to pay the income and dividends for the exclusive benefit of the Dublin Home for Starving and Forsaken

(1) 1 De G. & J. 72.
(2) 35 Ch. Div. 472.
(3) 25 L. R. Ir. 325, 340, 341.
(4) [1876] Seton (6th ed.), 1343.
(5) [1899] App. Cas. 323, 324.

Barton, J. 1910.

SWIFTE v. ATTY.-GEN.

Cats, is a valid charitable bequest. [His Lordship referred to the object of the institution and the circumstances connected with it, and proceeded]:—

The law applicable to this class of charitable gifts is tolerably well settled. The prevention of cruelty to animals is an object which the law recognizes as legally charitable. This is especially so in the case of animals useful to man. In *In re Douglas*; *Obert* v. *Barrow* (1) the principle was applied to a bequest to a "Home for Lost Dogs." The late Master of the Rolls has applied the principle to this very institution. In *Swifte* v. *Colam* (2) he ordered the balance of a sum of £450, after payment of costs, "to be held by the Commissioners of Charitable Donations and Bequests, upon trust to invest the *corpus*, and to pay the interest as it accrues due, to the said Miss Alice May Swifte, or other the Hon. Treasurer for the time being of the institution known as the Home for Starving and Forsaken Cats." The bequest in that case was a simpler one than the present case; and the only question in the present case seems to be whether there is anything to distinguish it from *Swifte* v. *Colam* (2).

I now turn to the will. We have, in the first place, a bequest of £4000 Consols "to the Commissioners of Charitable Donations and Bequests, . . . upon trust to apply the income and dividends thereof for the exclusive maintenance of the Dublin Home for Starving and Forsaken Cats." That is a good charitable bequest, unless there is something in what follows to invalidate it. The next material sentence is as follows:—"Including the maintenance of the chloroform chamber now existing, or any other painless method of putting an end to cases of hopeless pain, and the maintenance of the boarding department." This sentence commences with the word "including," which in its ordinary and natural meaning means "comprehending *inter alia*." The mention of the chloroform chamber, the use of which is limited to cases of hopeless pain, does not, in my opinion, affect the charitable character of the gift. The boarding department has been criticized because it appears to be self-supporting. That does not, in my opinion, affect the charitable character of the bequest. It appears to be a subordinate adjunct of the Home, and is intended to provide

(1) 35 Ch. D. 472, 479. (2) Unreported, Feb. 16, 1909.

shelter and food for cats who otherwise would be forsaken by their owners when they leave town. The testatrix then uses the words "but for no other purpose." These words refer back, in my opinion, to the word *exclusive*, and mean "for the exclusive maintenance of the 'Cats'' Home, and for no other purpose." She then proceeds to explain why she gives this bequest for the exclusive maintenance of the "Cats'" Home, and for no other purpose. The explanation is given in the sentence of the will commencing with the word "as." [His Lordship then referred to the deed of Feb. 27, 1888, and to the lease of Nov. 28th, 1884, and proceeded]:

The contents of the deed and lease explain why the testatrix insisted that her bequest was to be for the exclusive maintenance of the Cats' Home, and for no other purpose. The reason was that the general maintenance charges which were common to the Dogs' Home and to the Cats' Home were defrayed by the Society under the deed to which she refers, and by the lease of the common site of the Dogs' and Cats' Home. I need not refer to the gift over.

It seems to me that the construction which I have just put upon the language of the testatrix is the natural one, and that there is nothing to cut down or invalidate the original bequest, which in itself is merely a valid charitable gift.

I turn to the arguments which have been adduced *contra*. It was argued that the sentence commencing "as" is a condition precedent to the bequest, and that unless the Dublin Society for Prevention of Cruelty to Animals is under an enforceable legal obligation to pay the rent, taxes, repairs, and caretaker's wages, &c., of these premises, the gift fails. I assume, for the purpose of argument, that the Society is under no such obligation, but I can find no condition precedent. The word "as" is not conditional but explanatory.

It was argued, in the next place, that the word "including" is equivalent to "meaning," and was to be taken as introducing an exhaustive definition of the object of the gift; that the words "but for no other purpose" refer only to the two preceding departments of the Home, and that the bequest was, in fact, a bequest for the exclusive purpose of maintaining the chloroform chamber and the boarding department of the Home, which, by themselves, it is contended, could not constitute a legal charity.

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I need not discuss the latter question, because I am of opinion that this would be a strained construction of the bequest. It would be cutting down the clear bequest to the Home by giving to the word "including" a secondary meaning, which it would require a strong context to support.

On the whole, I am of opinion that this is a good charitable gift. The parties are agreed that, in view of these and the other provisions of the will, the order should direct the settlement of a scheme for the regulation and management of the charity, and for the application of its present and future income (1).

Solicitors for the plaintiffs: *Dix & Son.*

Solicitors for Society for the Prevention of Cruelty to Animals: *Carruthers & Gamble.*

Solicitor for the Attorney-General: *J. E. MacDermott.*

R. W. L.

M. R. 1911. Nov. 8, 9, 10.

LATHAM *v.* TRAVERS.

Will — Construction — Devise — Bequest — Lunatic — Fee-farm grant — Land purchase — Head rent — Redemption — Sale — "Surplus moneys" — Lunacy Regulation (Ireland) Act, 1871, *ss.* 63, 67 — *Irish Land Act*, 1903, *s.* 26.

Section 26 of the Irish Land Act, 1903, is inserted in and incorporated with the Lunacy Regulation (Ireland) Act of 1871, by force of the provisions of s. 26 itself.

Section 63 of the Lunacy Regulation (Ireland) Act, 1871, is, in effect, amended by the insertion therein, as one of the "purposes" for which the Lord Chancellor may order a sale of the lands of a lunatic, of the "purpose of a sale under the Land Purchase Acts."

In a suitable case "surplus moneys" in s. 67 of the Lunacy Regulation (Ireland) Act, 1871, may refer to the whole of the money raised and not merely to a balance.

"Land" in s. 26 of the Irish Land Act, 1903, includes a fee-farm rent, and by virtue of that section and of s. 63 of the Lunacy Regulation (Ireland) Act, 1871, the Lord Chancellor can order a sale of superior interests of which the lunatic is the owner.

Where a sale of real estate owned by a lunatic is carried out by virtue of s. 26 of the Irish Land Act, 1903, and s. 63 of the Lunacy Regulation (Ireland) Act, 1871, the real estate is not converted, or, if it has been dealt with by the lunatic's will, adeemed, but the "bonus" must be treated as personal estate.

Semble, ademption, as a branch of the law of revocation may involve *some* mental process.

(1) Affirmed by Court of Appeal, 3rd June, 1910.

Originating Summons taken out by Johanna Latham, the executrix of the will of James Thomas Nugent, the deceased, to determine (*inter alia*) the following questions:—

(1) Did the devise and bequest therein contained of "my share of the lands of Hermitage, Uttyneal, and Mullaghrea, in the parishes of Moynalty and Kilbegs," operate as a devise of (*a*) the grantee's estate and interest therein under an indenture of fee-farm grant, dated the 12th November, 1808; (*b*) the testator's moiety of the fee-farm rent of £224 2*s.* 8*d.*, payable thereout in equal moieties to the said deceased and the said plaintiff, Johanna Latham, respectively, as owners thereof?

(2) Did the sale of the said lands, under the circumstances in which the same took place, effect a conversion of the said interests, or either of them, in the said devise mentioned?

(3) Were the said interests, or was either of them, adeemed, and if so did such property pass to the heir-at-law or the next-of-kin of the deceased?

(4) Does the percentage payable under the Land Purchase (Ireland) Acts upon the sale of the said lands, and now represented by the sum of £612 14*s.* 4*d.*, form part of the residuary personal estate of the said deceased?

The will of Colonel Nugent, the deceased, contained the following bequest:—"I hereby give and bequeath, out of my money in the New 2¾ per cent. Consols, to Mrs. Latham, of the above address, £1500, *and my share of the lands of Hermitage, Uttyneal, and Mullaghrea in the parishes of Moynalty and Kilbegs*, near Kells, Co. Meath, and my share of the property Nos. 1, 2, and 3, Luke Street, city of Dublin."

Colonel Nugent was entitled to the lands of Hermitage, Uttyneal, and Mullaghrea, subject to a fee-farm rent of £224 2*s.* 8*d.* He was also absolutely entitled to one moiety of the said fee-farm rent.

Colonel Nugent, having decided to offer the said lands to the Estates Commissioners, advertised for proposals for purchase of the different lots, the purchase-money to be advanced by the Land Commission. A number of persons responded to this advertisement, and signed undertakings for purchase at sums

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amounting to £5363. These undertakings, which were in the form prescribed by the rules of the Irish Land Commission, were (save in one case) signed by the deceased early in the month of April, 1905, and the necessary originating request, signed and verified by the deceased, together with the said undertakings, was lodged in the Estates Commissioners' office on the 28th April, 1905. In the remaining case the undertaking to purchase, though dated the 2nd April, 1905, was not signed until the month of July, 1905, by Colonel Nugent's solicitor, under a power of attorney. Colonel Nugent became mentally affected in the end of the year 1905, and was declared a lunatic by order of the Lord Chancellor dated the 13th January, 1906. By an order in the lunacy proceedings, dated the 16th March, 1906, it was declared that the agreements entered into by the deceased with the tenants of his property at Hermitage for the sale to them of their holdings under the provisions of the Irish Land Act, 1903, should be confirmed and carried out accordingly, and it was ordered that the committee should proceed as he might be advised for the purpose of having such sales completed. On the 14th May, 1907, a further order was made by the Lord Chancellor that for the purpose of carrying out the sales under the Irish Land Act, 1903, authorized by the said order of the 16th March, 1906, the committee should be at liberty in the name and on behalf of the lunatic to consent to the purchase of the lands by the Estates Commissioners upon the terms sanctioned by the said order, and to include in such sale the untenanted lands.

In the course of the Land Commission proceedings it became apparent that there were no binding contracts for sale, and that most of the persons purporting to agree with Colonel Nugent were not tenants, and that the sale must be proceeded with on the basis that Colonel Nugent had merely initiated proceedings so as to enable him to sell, and the Land Commission to buy, if the Land Commission elected to make an offer. A proposal to purchase was issued by the Estates Commissioners on the 7th April, 1908.

On the 18th May, 1908, an order was made by the Lord Chancellor whereby it was declared to be for the benefit of Colonel Nugent, and to be just and reasonable, that the property

of Colonel Nugent in the county Meath, being the lands of Uttyneal, Hermitage, and Mullaghrea, should be sold to the Estates Commissioners for the purposes of the Irish Land Act, 1903, for the sum of £5136, and it was accordingly further ordered that the committee be at liberty, through his solicitors, to take all requisite steps for carrying out such sale, and to apply that the net amount available in respect of the purchase-money should, in due course, be transferred to the credit of the lunacy matter and separate credit of the sale of the lands.

On the 14th November, 1908, an order was made that the committee be at liberty to accept a reduction of £30 in the purchase-money in the case of one holding, the offer of the Estates Commissioners being reduced by a like sum.

In pursuance of these orders the offer of the Estates Commissioners was accepted by the committee on the 12th June, 1908, and the sale duly carried out. An order of the Land Commission was made vesting the estate in the Irish Land Commission on the 2nd December, 1908. On the 7th December, 1908, an order was made in the lunacy proceedings that the committee be at liberty to apply to the Court of the Irish Land Commission that the fees and remuneration payable under the agreement which Colonel Nugent had entered into with his solicitors at the commencement of the proceedings for sale, be paid out of any moneys coming to Colonel Nugent in respect of the sale, either on foot of his claim as the owner of a superior interest or on foot of his claim to bonus.

The purchase-money of £5106 was paid on the 25th February 1909.

On the 15th January, 1910, an order was made in the lunacy proceedings giving liberty to the committee to consent to the deceased's moiety of the head-rent of £224 2*s.* 8*d.* being redeemed at the sum of £2450.

Title on behalf of Colonel Nugent was subsequently shown to the moiety of the head-rent in the Land Commission matter, and the amount of the redemption price thereof was transferred to the credit of the lunacy matter, and to separate credit of one moiety of the redemption price of the head-rent of £224 2*s.* 8*d.* The holdings were vested in the tenants on the 7th July, 1910.

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The Solicitor-General, Herbert Wilson, K.C., and *The Hon. C. Atkinson*, for Johanna Latham :—

The attempted sale before the lunacy proceedings was wholly nugatory. There were no real tenants, and therefore no agreements. The first proceedings having no existence in law, the second proceedings taken after the lunacy matter cannot be tacked on to them. In the ordinary management of a lunatic's estate the Court pays no attention to those coming after, but it will not alter the general character of the estate more than is necessary : *The Attorney-General* v. *The Marquis of Aylesbury* (1) ; *Ex parte Haycock* (2) ; Pope on Lunacy, p. 339. There was no binding agreement when the Lord Chancellor made his first order. An originating application and an originating request differ *toto cælo*.

On an originating request it is open to the statutory body to inspect or not : *Marianne Doyle's Estate* (3).

G. FitzGibbon, K.C., Pigot, K.C., and *F. Mooney*, for Julia Travers, an assignee of the heir-at-law and of one of the next-of-kin :—

There is no change in the character of the property of a person under disability where his land is changed into money, because there is no election as to the form in which he will take the money. So where purchase-money is paid into Court under section 69 of the Lands Clauses Consolidation Act, 1845 : *Kelland* v. *Fulford* (4). Assuming that the expression " my share of the lands of Uttyneal " comprised the superior interest belonging to the testator under the fee-farm grant, the redemption-price of that superior interest could not pass to the devisee, as the redemption of the fee-farm rent adeemed the devise.

Ademption does not depend upon intention, and the law knows no such thing as *animus adimendi* : *Slater* v. *Slater* (5). In deciding whether ademption has taken place or not, the sole test is, " Does

(1) 12 App. Cas. 672.
(2) 5 Russ. 154.
(3) [1907] 1 I. R. 204.
(4) 6 Ch. D. 491.
(5) [1907] 1 Ch. 665, at p. 671.

the estate or thing devised or bequeathed still exist?" *Barker* v. *Rayner* (1). It cannot be suggested that a lump sum in cash is the same thing in substance as a perpetual rentcharge. Where there is conversion there must be ademption, but the converse proposition is not true. Specific lands devised may not exist at the date of the death, in which case the devise is adeemed, yet they may be represented by other lands or a fund in Court retaining the character of real estate when there would be no conversion: *Bagot's Settlement* (2). As conversion depends upon intention, there is no conversion where disability exists, except by virtue of an order of a competent authority. Here the only *sale* effected under any order in lunacy was that of the immediate landlord's interest to the occupying tenants. There was no *sale* at all, under the Lunacy Acts or otherwise, of the fee-farm rent, but the rent was destroyed in consequence of the sale of the lower interest. Section 67 of the Lunacy Regulation (Ireland) Act does not affect this case, as it is not incorporated in the Land Act of 1903, and the sale to the Estates Commissioners was not directed for any of the purposes of section 63 of the Lunacy Act. Section 26 of the Land Act of 1903 authorizes a sale of a lunatic's property for purposes wholly alien to those specified in the Lunacy Act, and it is unlikely that, in carrying out its policy of creating a peasant proprietary, the Legislature paid much regard to the interests of persons under disability in a statute which bribes tenants for life to betray the interests of those entitled in remainder, and which is amended and extended by an Act which increases the amount of the bribe in direct proportion to the extent of the betrayal.

The Lord Chancellor did not, and could not, sell anything under section 63 of the Lunacy Act: *In re Corbett* (3); and he could not, and did not, purport to sell the fee-farm rent at all, for the only sale authorized by him was one of the lunatic's *lands* to the Estates Commissioners.

The fee-farm rent was destroyed, not sold, and, therefore, the devise of it was adeemed; but as the destruction was compulsory, and neither did nor could require or receive the consent of the

(1) 5 Madd. 208.
(2) 31 L. J. (N. S.) Ch. 772.
(3) L. R. 1 Ch. App. 516.

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lunatic or of anyone on his behalf, there was no conversion, and the redemption-moneys retain the character of real estate.

Ademption follows a sale by the Court: *Ex parte Haycock* (1); *Jones* v. *Green* (2); *Freer* v. *Freer* (3); *Browne* v. *Groombridge* (4); and *a fortiori* it follows a compulsory destruction of the subject-matter of the devise or bequest: *Frewen* v. *Frewen* (5).

So far as the sub-interest is concerned the fund in Court represents residue of the bonus, as the purchase-money was all exhausted, and the bonus would not pass under a devise of the "lands of Uttyneal."

T. S. M'Cann, K.C., for Mary E. Duffy, one of the next-of-kin.

An analysis of the cases shows that a change of land into money, though compulsorily or without consent, effects a conversion, provided it is carried out lawfully. The rule is not affected by the lunacy or infancy of the owner, and applies in all cases save where the change is effected under a statute which requires the money to be reinvested in land: *Dixie* v. *Wright* (6); *Ex parte Cramer* (7), which was decided under a statute containing the same provisions as the Lands Clauses Acts; and see *Re Harrop's Estate* (8). *In re Flamank* (9) was criticized adversely in *In re Tugwell* (10), but on the ground that the purchase was not authorized. There is no equity to restore property as between real and personal representatives: *Ex parte Phillips* (11); *Hartley* v. *Pendarves* (12); *Steed* v. *Preece* (13); *Hyett* v. *Mekin* (14); *Burgess* v. *Booth* (15); *Cadman* v. *Cadman* (16); *Frewen* v. *Frewen* (5). *Bagot's Settlement* (17) was decided under a special Act containing clauses similar to those of the Lands Clauses Act.

The only question is, was the sale lawfully carried out? The

(1) 5 Russ. 154.
(2) L. R. 5 Eq. 555.
(3) 22 Ch. D. 622.
(4) 4 Madd. 495.
(5) L. R. 10 Ch. App. 610.
(6) 32 Beav. 662.
(7) 1 Sm. & G. 32.
(8) 3 Drew, p. 733.
(9) 1 Sim. (N. S.) 260.
(10) 27 Ch. D. 309.
(11) 19 Ves. 118.
(12) [1901] 2 Ch. 498.
(13) L. R. 18 Eq. 192.
(14) 25 Ch. D. 735.
(15) [1908] 2 Ch. 648.
(16) L. R. 13 Eq. 470.
(17) 31 L. J. (N. S.) Ch. 772.

Lunacy Regulation (Ireland) Act, 1871, does not apply. "Land" under s. 26 does not include superior interests. There was no need to embody a provision such as that in section 26 for the sale of a superior interest. The Act deals automatically with superior interests. See s. 16. M. R. 1911. LATHAM v. TRAVERS.

[MEREDITH, M.R.: You treat the section as if no owner could agree to sell his fee-farm rent. There is every reason why the Chancellor should have power to direct the sale of a fee-farm rent.]

Herbert Wilson, K.C., in reply:—

The proceedings were commenced by request. The Lord Chancellor's order of the 18th May, 1908, contains no direct reference to the fee-farm rent. There was no compulsory redemption of this rent. Section 26 only gives the Lord Chancellor power to sell land where the reasons of section 63 are not present. All the proceeds of the sale of a lunatic's estate are surplus moneys within the meaning of section 67. The grantee's interest under the fee-farm rent was of no value, as the income remaining to the lunatic had never exceeded his moiety of the head-rent.

The principle of compulsory redemption of head-rents and other superior interests was first introduced by section 31 of the Land Act of 1896. There is nothing in this section or in any other section of the land-purchase code to deprive the owner of a head-rent of the right of selling his head-rent by contract and without compulsion.

Pigot, K.C., in reply:—

Unlike conversion, ademption does not depend on intention: *Browne* v. *Groombridge* (1). There is no reference to the superior interest in the order.

THE MASTER OF THE ROLLS:— Nov. 10.

In cases like the present I take the view manifestly taken by Ross, J., in *Stinson's Estate* (2), that important questions of law, affecting not merely the particular estate before the Court, but also many other estates in Ireland, should be decided by a Judge of first instance at the earliest moment, in order that the Court of Appeal may determine the law at the earliest possible

(1) 4 Madd. 495. (2) [1910] 1 I. R. 13.

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date. The main questions in the present case are of such supreme importance to persons of unsound mind who are possessed of landed estates, or rents issuing out of landed estates, that I venture to express a real desire that my view should be tested elsewhere. The case has been argued in a manner deserving of its importance and many topics have been discussed. Let me deal first with the question as to the *form* of the originating document presented to the Land Commission. In my opinion, the question of *form* is of no importance; it is the substance that counts. If, indeed, Colonel Nugent had in the year 1905 entered into binding agreements with *bona fide* tenants to sell to them (in the event of the Land Commission declaring his estate a separate estate) upon the terms mentioned in those agreements, and if before he became of unsound mind an originating *application* had been duly filed and the agreements had been lodged with the Land Commission pursuant to their rules, and if the sale had been carried out accordingly, the question before me never would have been argued. Because Colonel Nugent being then of sound mind would have entered into contracts to sell his estate *direct* to his tenants, and the contracts would have been completed in law and fact. I have no intention of going back to the beginning of things, or re-discussing *Sherlock's Estate* (1). It is enough to say that it is now clear beyond question that the agreement between landlord and tenant prescribed by the Land Commission has been held to be valid and to operate as a conditional contract for sale to be performed within a reasonable time: see *Doyle's Estate* (2). But in the present instance the sale was not *direct* from landlord to tenant. It was from landlord to Land Commission. I have carefully gone through the Land Commission proceedings. The document by which the proceedings were commenced in the Land Commission Court was an originating *request* under *section 6*, and in substance and in fact was, and was meant to be, an originating request. An originating request is a request to the Land Commission to inquire and investigate and (if after inquiry and investigation they think fit) to make an offer for the purchase of the estate by the Land Commission from the landlord. It facilitates the Estates Commissioners if the tenants indicate by

(1) [1899] 2 I. R. 561. (2) [1907] 1 I. R. 204.

provisional agreements that, in the event of purchase by the Land Commission, the tenants are willing to repurchase their holdings from the Land Commission; but sales to the Land Commission differ completely, as regards procedure and results, from sales direct by the landlord to the tenants.

There never was any binding agreement for sale, in the events that happened, entered into by Colonel Nugent while of sound mind. The original order of the Lord Chancellor was based, no doubt, on the view that Colonel Nugent had entered into binding agreements with *bona fide* tenants, and that these contracts should be carried out if possible. The mistake—for it was a mistake—was a natural one. The consequential directions were based on the view that binding agreements between landlord and tenant had been entered into. [His Lordship referred to the directions.] The order was that agreements made should be confirmed and that the committee should obtain payment of the net purchase-money if the sale went through.

In the course of the Land Commission proceedings it became apparent that there was no binding contract; it became apparent that the persons, or at all events most of the persons, purporting to agree with Colonel Nugent were not tenants, and that the sale must be proceeded with on the basis which was the true basis, that Colonel Nugent had merely set the machinery in motion to enable him to sell and the Land Commission to buy, if the Land Commission, after due inquiry, elected to make an offer. It was because I had that in mind that I said to the Solicitor-General that the sale in the Land Commission must relate back to the originating document. But I did not intend to suggest that the contract of sale, when entered into in a case under section 6, would relate back to the originating request with the like consequences as in the case of *Weeding* v. *Weeding* (1). The form of originating request is immaterial. The substance is, that it was merely an invitation to inquire; and the crucial moment when a definite contract for sale was entered into was when the committee, acting under the Lord Chancellor's order, accepted the Land Commission's offer for purchase of the

(1) 1 J. & H. 424.

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estate. The order of the Lord Chancellor is dated 18th May, 1908. [His Lordship read the order.] The sale, and the only sale I have to deal with, was, and is, a sale to the *Estates Commissioners* for the purposes of the Act of 1903 for £5136. Up to that moment there was no concluded agreement or contract in respect of which any question of conversion could arise.

No one can argue that prior to the 18th May, 1908, there was any contract binding on the committee of Colonel Nugent to sell either to the Land Commission or to the tenants. The sale sanctioned by the Lord Chancellor was carried out under section 6; the starting-point is the 18th May, 1908, and the main question I have to determine is this, was the operation of that order and of the proceedings under that order to authorize the conversion of land into money without any protecting safeguard, any reservation of the rights *inter se* of the devisees or heirs on one side and the next-of-kin or residuary legatees on the other. That question is of great importance, not merely to the parties here, but to all land-owners who are brought under the care and jurisdiction of the Lord Chancellor. The question is a serious one, but the answer to it is (in my judgment) a plain one. I hold that sect. 26 of the Irish Land Act, 1903, the section so ably dealt with by counsel on all sides, is inserted in and incorporated with the Lunacy Regulation (Ireland) Act of 1871 by force of the provisions of section 26 itself.

I hold, on the true construction of the statutes of 1871 and 1903, that s. 63 of the Act of 1871 is amended by the insertion therein, as one of the "purposes" for which the Lord Chancellor may order a sale of the lands of a lunatic, of the "purpose" of a sale under the Land Purchase Acts. If that be the true meaning of section 26, all doubts disappear; section 63 is amended, but the code stands; and one of the purposes for which the Lord Chancellor may direct a sale is the transfer of the land to the tenants or the Land Commission, for the purposes of facilitating the great policy of the Land Purchase Acts. To take section 26, as standing by itself, divorced from the code, *i.e.*, the code embodied in the Lunacy Act of 1871, might lead to serious inconvenience; but the argument from inconvenience has no application to a case under the land code. I rest my decision on the words of sect. 26. [His Lordship read the section.] I read that section into sect. 63,

and apply section 67 of the same Act (Lunacy Act, 1871) to the enlarged and extended section. The strongest argument against this arises from the use of the words "surplus moneys" in section 67. My answer is, that if necessary the Lord Chancellor would apply purchase-moneys for the particular purposes mentioned in section 63; and if he did so, the word "surplus" would be absolutely correct. "Surplus moneys" mean moneys not expended; and to say they must necessarily mean *balance* unexpended, and that you cannot apply the section where the whole of the money remains intact, is not a sound argument. [His Lordship read section 67.] Let me take one instance, "payment of or provision for the expenses of his" (the lunatic's) "future maintenance" (section 63). Suppose the money was raised, and the lunatic died before any money was expended, could it be contended that section 67 did not apply because it was not the case of a *balance*? In suitable cases the expression "surplus" money may be used whether it refers to a part of the money or to the whole. The reasoning applies to cases brought under section 63 by section 26, and the rights of the parties are governed by section 67. The question must have arisen before this, but there is no reported case. I asked the Registrar in Lunacy, and he told me the view taken by Sir Samuel Walker was that purchase-money was safeguarded by section 67, and that the policy of the Legislature in the Act of 1871 was maintained in sales under the Land Purchase Acts. But the Registrar also told me that as to the bonus, in Sir Samuel Walker's view, the bonus was personal estate of the lunatic, and was not caught by a specific devise of lands, and, in case of complete or partial intestacy, would pass to the next-of-kin. I respectfully acquiesce in that view. It is unnecessary to go through the cases. Kekewich, J.'s, decision in *Annaly's Estate* (1) has been commented on, but in the same estate, when the purchase-moneys were allocated by me in the Land Commission (2), I said I would follow Kekewich, J., reserving to myself the right to reconsider the point if the same question arose in any other estate. All subsequent decisions in this country go on the basis that the bonus is not (save in certain specified cases) purchase-money, but is a personal gratuity paid by the

(1) 92 L. T. (N. S.) 13. (2) 5 N. I. J. R. 117.

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state to the vendor for the purpose of enabling the policy of the Land Purchase Acts to be carried into effect. In the present case the bonus must be dealt with as personal estate of Colonel Nugent.

Now, as regards the proceeds, if any, of the sale of the lands as distinguished from the sale of the head-rent, I entertain no doubt that I must hold the plaintiff, the devisee, entitled by virtue of section 67 of the Act of 1871 to those proceeds, notwithstanding all that has occurred. I use the words "if any" because it would appear that there are no moneys in the Land Commission representing the grantee's estate in the lands as distinguished from his estate in the moiety of the fee-farm rent, and that the balance, after paying costs and the sum of £2,250, represents bonus.

The second question which arises for decision is one of equal importance. Colonel Nugent was also owner of one moiety of a head-rent reserved by a fee-farm grant, and I have to determine first whether the Lord Chancellor had any jurisdiction under section 63 to order a sale of the fee-farm rent, and if he had, did he ever exercise it. On the question of jurisdiction my mind is free from doubt. From the moment the Land Purchase Acts became a living force, the question of dealing with superior interests became a vital matter, and by degrees the policy of converting tenants into owners was accompanied by a policy for distributing the purchase-money among those entitled to it. There was not much inducement to an owner, beset with rent-charges, to sell, if the purchase-money was for ever to be locked up. Tracing the development of legislation, I come to the conclusion that one of the objects aimed at by the Legislature was freeing the purchase-money from the claims of owners of superior interests, as well as freeing tenants from the claims of the landlord. Mr. Pigot has put the question, Would the Lord Chancellor have power in a case where there was no dual interest, if a lunatic were merely owner of the superior interest, to order a sale of the rent to enable the landlord to carry out a sale? My answer to that question is "Yes." I cannot see any valid reason why the Lord Chancellor should not have in respect of lunatics' estates the right every owner of a head-rent has, the right by voluntary agreement to sell his right as owner of a superior interest. It seems to me part of the policy of the Land Acts that compulsory powers should not

be put into force till voluntary means have been exhausted. Section 26 of the Act of 1903 is wide enough to cover the case; "land," of course, includes fee-farm rents.

The fallacy, if I may say so with respect, in the argument addressed to me on the point was this—Mr. McCann insisted that compulsory redemption is the only method; I say there is the alternative of voluntary sale. Though it is now far more convenient for owners of superior interests to have the amount of redemption money fixed in Court, and an order for redemption made, voluntary contracts are not excluded and Colonel Nugent could have entered into a voluntary agreement, and not required a compulsory redemption. The Lord Chancellor has taken the place of the lunatic, and he can order a sale not merely of lands in occupation of the owners, but also of superior interests. In this case I hold he did so. Whatever passed under the will of the testator by the words "my share" formed the subject-matter of the Lord Chancellor's order for sale, and embraced the head-rent, both the grantor's and grantee's interest. That the words, "my share," of the lands of Hermitage, &c., passed all the estate and interest of the testator, whether as grantor or grantee, has hardly been debated. It is too clear for discussion; so far as the devise is concerned, it is impossible to maintain that rent and lands were not included. Starting with the order of the 18th May, 1908, and proceeding through the acceptance of the Land Commission's offer, and dwelling on the order of the 15th January, 1909, I conclude that the order of the Lord Chancellor was an order for the sale of every estate of the lunatic in the lands, subject only to the moiety of head-rent payable to Mrs. Latham, and to the payment of the price agreed to and accepted in respect thereof. It is not necessary to read the orders to point out that, so far as the Lord Chancellor was concerned, no distinction was taken between redemption-price and purchase-money, or to embody in my judgment the words of the order. They clearly impress on my mind what the Lord Chancellor meant by his order. He meant "sell all the lunatic has, and bring the net proceeds into this Court." Perhaps I have not clearly expressed the result of the Lord Chancellor's orders; but that is my view, and the documents in the lunacy matter speak for themselves. But Mr. FitzGibbon and Mr. Pigot

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say, "Look at the allocation schedule." This is a substitute for a final schedule. I agree, and I must deal with the allocation schedule as if it were a final schedule, and as if Wylie, J., would turn the rulings on the schedule into actual orders if called upon. If he were to draw up an actual order, redeeming this rent at £4900, and transferring one moiety to Mrs. Latham and one moiety to the committee of Colonel Nugent, it would not alter my view of the Lord Chancellor's order. Wylie, J., exercised no jurisdiction *in invitum*, and to suggest that this was a hostile order is to press the argument as to the compulsory nature of these rulings to an extreme. The committee was entitled to get all the purchase-money after the costs and the redemption-price of the Latham moiety had been paid. It was not a compulsory order obtained by the committee of Colonel Nugent against himself.

For these reasons I hold that the proceeds of the sale of the moiety of the head-rent pass to the plaintiff as devisee by the combined effect of section 26 of the Act of 1903 and sections 63 and 67 of the Lunacy Regulation Act, 1871.

I have now dealt with the main questions.

Two other matters were so fully debated that I desire to say a word or two with respect to them, though what I have already said renders my view with respect to them of no importance. As regards *ademption* I express a pious hope that possibly at some future time the question may be open as to whether ademption is not an off-shoot of the law of revocation, involving *some* state of mind—*some* mental process. Revocation, of course, involves intention. But I am not going back of what I said in *Goddard* v. *Overend* (1), relying on *Oakes* v. *Oakes* (2), *Slater* v. *Slater* (3), *Longfield* v. *Bantry* (4), and *The Carron Company* v. *Hunter* (5).

As to the general law relating to conversion in cases of acquisition under compulsory statutory powers of lands belonging to persons under disability, I only touch on it for this reason:—Mr. M'Cann dealt with case after case in one of the ablest and most cogent arguments I have heard for a long time.

(1) [1911] 1 Ir. R., p. 165.
(2) 9 Hare, 666.
(3) [1907] 1 Ch. 665.
(4) 15 L. R. I. 101.
(5) L. R. 1 H. L. (Sc.) 362.

Mr. Pigot replied in an argument of great weight and power. If it should become necessary to argue the question hereafter, I desire to place on record the fact that the point was fully opened and debated before me, but that I found it unnecessary to decide the question.

I answer the questions as follows:—

"This Court doth declare that on the true construction of the will of the said testator, James Thomas Nugent, and in the events that have happened, the devise and bequest in the said will contained of the testator's share of the lands of Hermitage, Uttyneal, and Mullaghrea, in the parishes of Moynalty and Kilbegs, operated as a devise of both (*a*) the grantee's estate and interest therein under an indenture of fee-farm grant, dated the 12th November, 1808, and (*b*) the testator's moiety of the fee-farm rent of £224 2*s.* 8*d.*, payable thereout in equal moieties to the testator and the plaintiff, Johanna Latham, respectively, as owners thereof, and that the sale of the said lands, under the circumstances in which the same took place, did not effect a conversion of the said interests, or either of them, in the said devise mentioned, nor were the said interests, nor was either of them, adeemed, and the Court doth declare that the percentage or bonus payable under the Land Purchase (Ireland) Acts upon the sale of the said lands, and now represented by the sum of £612 14*s.* 4*d.*, forms part of the residuary personal estate of the said testator."

Solicitors for Johanna Latham: *O'Keefe & Lynch.*
Solicitors for Julia Travers: *G. D. Fottrell & Son.*
Solicitor for Mary E. Duffy: *Charles MacMahon.*

A. E. C.

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Nov. 3.
Dec. 1.

FREDERICK J. R. HUGHES *v.* THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND.

Landlord and tenant—Lease for lives renewable for ever—Obligation on lessee to accept renewals—Implied covenant—Intention.

In a lease for lives renewable for ever, the *habendum* was to the lessee, his heirs, and assigns, for the lives therein named, and of the survivors of them, "and the natural lives and life of all and every such other person and persons as shall from time to time for ever hereafter be named and added hereunto, pursuant to the covenant for perpetual renewal hereinafter contained." The lease contained (*inter alia*) a covenant by the lessee to repair the demised premises, and yield up the same in repair at the end or other sooner determination of the demise: also a covenant by the lessor to renew, upon the death of any life therein named or thereafter to be added, "so as the number of three lives may be always kept full according to the true intent and meaning of these presents," the lessee first paying unto the lessor a nominal fine, if demanded, for each new life to be added and all arrears of rent . . . . "it being the true intent and meaning of these presents and of the parties hereunto that (the lessee) nominating and appointing a life in the place or stead of any of the lives hereinbefore named, or hereafter to be named, and tendering renewals ready drawn, and paying the said fine, if demanded, and all arrears of rent . . . . shall and may from time to time, and at all times for ever hereafter, have, hold, and enjoy, ... the demised premises."

Held, that the lease contained an implied covenant on the part of the lessee to accept renewals.

Ward v. *McRoberts* (25 L. R. Ir. 225), and *Trench* v. *Wallace* ([1904] 1 Ir. R. 290), applied.

ORIGINATING SUMMONS.

For the determination of the question as to whether upon the true construction of the lease of 1st September, 1821, there was contained an implied covenant on the part of the lessee to accept and take out renewals thereof:—and for a declaration that the defendants, in whom all the estate and interest of the lessee under said lease were then vested, were bound to accept and take out renewals or new leases thereof, and to execute counterparts thereof to the plaintiff, in whom all the estate and interest of the lessor thereunder were then vested.

By lease, dated 1st September, 1821, made between Robert Hughes, of the first part, the Right Hon. Charles Henry Lord Castlecooke, the Hon. Abraham Augustus Hely-Hutchinson, Henry Hamilton, and Hulton Smith King, Commissioners of His then Majesty's Revenue of Customs and Port Duties in Ireland, of the second part, and Pierce Newton King, collector of the Port and district of Wexford, in trust for and on behalf of His then Majesty King George IV., his heirs, and successors, of the third part, the said Robert Hughes for the consideration therein named did thereby, with the consent of the said Commissioners, demise unto the said Pierce Newton King, and his heirs, and assigns, ALL that and those that piece or plot of ground on which several buildings and an enclosed yard were then erected adjoining Anne Street, in the town of Wexford, as therein described, "To hold the said hereby demised premises with the appurtenances unto the said Pierce Newton King, his heirs and assigns, from the 25th day of March, 1821, last past, for and during the natural lives and life of William Hughes, Nathaniel Hughes, and Robert Wigram Hughes, and of the survivors and survivor of them and the natural lives and life of all and every such other person and persons as shall from time to time for ever hereafter be named and added hereunto or nominated and appointed as lives or *cestuis que vies* pursuant to the covenant for perpetual renewal thereof hereinafter contained, he the said Pierce Newton King, his heirs, and assigns, yielding and paying therefor and thereout yearly and every year during the continuance of this demise unto the said Robert Hughes, his heirs, and assigns, the yearly rent or sum of £154 12*s.* 6*d.*" in the manner therein mentioned. And after providing for distress and re-entry in case of non-payment of the said rent the said lease contained covenants and declarations in the following terms:—"AND the said Pierce Newton King doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said Robert Hughes, his heirs, and assigns, that he the said Pierce Newton King, his heirs, executors, administrators, and assigns, shall and will from time to time and at all times hereafter during the term hereby demised well and sufficiently

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content and pay unto the said Robert Hughes, his heirs, and assigns the said reserved yearly rent of £154 12*s.* 6*d.*, on the days and times hereinbefore mentioned for payment thereof, and shall and will at all times hereafter during the continuance of this demise well and sufficiently preserve, uphold, maintain, and keep the said hereby demised premises and all improvements now made or hereafter to be made thereon in good tenantable order, repair, and condition, and at the end or other sooner determination of this demise, shall and will so leave and yield up the same and the quiet and peaceable possession thereof in the like good order, repair, and condition to the said Robert Hughes, his heirs, or assigns; AND the said Robert Hughes doth hereby for himself, his heirs, and assigns, covenant, promise, and agree to and with the said Pierce Newton King, his heirs, and assigns, in manner and form following, that is to say, that he the said Robert Hughes, his heirs, or assigns, upon the death of any or either of the persons for whose life or lives the said premises are hereby demised, and upon the death of any other person or persons whose name shall at any time hereafter be added hereunto in the place or stead of the person or persons so dying, shall and will within six calendar months next after the death of such person or persons so dying, add and insert the name and names of such other person or persons as shall be nominated or appointed by the said Pierce Newton King, his heirs, or assigns, or his successor collector, or by the said Commissioners, or their successors Commissioners, in the place or stead of the person or persons so dying, which life and lives is and are to be added and inserted by deed or writing to be annexed hereto, or by a separate deed or grant of the said demised premises, to the said Pierce Newton King, his heirs, or assigns, or to his successor collector, or to the said Commissioners, or their successors Commissioners, or to any other person or persons they may appoint for that purpose, for and during the life and lives then in being, and for such other life or lives as shall be thereunto nominated and added as aforesaid, so as the number of three lives may be always kept full according to the true intent and meaning of these presents, the said Pierce Newton King, his heirs, and assigns, or his

successor collector, or the said Commissioners, or their successors Commissioners, first paying unto the said Robert Hughes, his heirs, or assigns, the sum of 1*s.*, if demanded, for such new life so to be added as aforesaid, and all arrears of the said hereby reserved yearly rent or rents as the case shall be, or which shall be then due or in arrear, and all and every of which said renewals shall from time to time and at all times for ever hereafter be made and executed by the said Robert Hughes, his heirs, and assigns, at the proper costs and charges of the person or persons applying for the same, it being the true intent and meaning of these presents and of the parties hereunto that the said Pierce Newton King, his heirs, or assigns, or his successor collector, or the said Commissioners, or their successors Commissioners, nominating and appointing a life in the place or stead of any of the lives hereinbefore named or hereafter to be named, and tendering renewals ready drawn, and paying the said fine of 1*s.*, if demanded, and all arrears of rent or rents which shall be then due and owing within six calendar months after the decease of any of such *cestui que vies*, shall and may from time to time, and at all times for ever hereafter, have, hold, and enjoy the said hereby granted and demised premises under and subject to the rent and covenants in this indenture reserved and contained." The lease contained covenants by the lessor for quiet enjoyment, and to accept a surrender if "at any time hereafter during the continuance of this demise" any proceedings should be taken on foot of certain judgments affecting the premises whereby the said Commissioners should suffer any loss, and also a declaration by the said Pierce Newton King in the following terms:—"AND the said Pierce Newton King doth hereby for himself, his heirs, and assigns, acknowledge and declare that this present demise is made to, and accepted of by, him in trust, and to and for the use of His Majesty King George IV, his heirs, and successors, and to and for no other use, trust, or purpose whatsoever, and that he, the said Pierce Newton King, his heirs, or assigns, shall and will at any time hereafter, but at the costs and expenses of the person or persons applying for the same, make, do, and execute or cause or procure to be made, done, and executed any deed

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or deeds which may be deemed or advised necessary for the better and more effectually declaring the trust aforesaid."

By indenture of renewal lease, dated the 14th October, 1844, and made between the said Robert Hughes, of the one part, and C. A. Scovell, Secretary to the Commissioners of Her then Majesty's Customs, of the other part, the said lease was renewed for the three lives therein mentioned, of whom the late King Edward VII, who died on the 6th May, 1910, was the last surviving life.

The lessor's interest under said lease subsequently became vested in the plaintiff, and the lessee's interest thereunder became vested in the defendants for the public service, by virtue of the provisions of the Customs and Inland Revenue Buildings (Ir.) Act, 1882 (45 & 46 Vict. c. 17).

In October, 1910, the defendants wrote to the plaintiff stating that they were not prepared to nominate a new life, and that they proposed to hand over possession of the premises to the plaintiff. The plaintiff thereupon served notice upon the defendants, calling upon them to take out a renewal, and stating that the plaintiff was ready to execute such renewal, or a fee-farm grant, upon the same being tendered.

At the suggestion of the defendants, without prejudice, the plaintiff proceeded by summons under Order LIV, A, to have the question of liability to renew determined.

W. M. Jellett, K.C., and J. E. Walsh, for the plaintiff :—

It is evident that the intention of the parties to the lease of 1821 was that the lessee should have a perpetual interest in the premises demised. The terms of the *habendum*, the covenant by the lessor to renew, and the declaration of intention clearly show that this was the intention of the parties. The Court will imply a covenant on the part of the lessee binding him to accept a renewal from the lessor, if so required : *Curry* v. *Stanley* (1) ; *Pilson* v. *Spratt* (2) ; *Ward* v. *McRoberts* (3) ; *Hickey* v. *Ronayne* (4) ; *Foley* v. *Roland* (5) ; *Trench* v. *Wallace* (6). In the present case the declaration by the lessee that he will

(1) H. & J. 487.
(2) 25 L. R. Ir. 5.
(3) 25 L. R. Ir. 224.
(4) 35 Ir. L. T. R. 208.
(5) [1898] 1 Ir. R. 311.
(6) [1904] 1 Ir. R. 290.

"at any time hereafter" more fully declare the trust, affords an additional indication of the intention of the parties. Under section 5 of 32 & 33 Vict. c. 74, the Commissioners of Public Works are liable to all covenants and conditions, express or implied, in relation to lands transferred to them. The premises became vested in them under 45 & 46 Vict. c. 17, subject to the provisions of 32 & 33 Vict. c. 74.

The Attorney-General (*The Right Hon. C. A. O'Connor, K.C.*) and *W. J. Johnston, K.C.*, for the defendants:—

The words in the clause declaring the intention, "the lessee nominating and appointing a life . . . and tendering renewals ready drawn . . ." show that the intention was that renewing was to be optional with the lessee. The principle of the cases relied on all flows from *Curry* v. *Stanley* (1), which was the case of a sub-lease. The principle underlying that case was, that where the lessor in the sub-lease had obtained a renewal of his lease for the purpose of feeding the sub-lease, it would be inequitable to allow the sub-lessee to refuse to renew. The sub-lessees will not be listened to, saying, "Whatever you may have done in renewing your lease, or whatever sum you may have paid, we will take a new lease when we think fit, and until then keep our money in our pockets": *per* Brady, C., in *Morgan* v. *Gurley* (2); see also *Lord Frankfort* v. *Thorpe* (3). That principle was intelligible, but should not be extended beyond the class of case to which it was intended to apply, unless where there are special provisions in the lease which would justify the Court in applying it, as in *Ward* v. *McRoberts* (4), where the lessee had covenanted to pay a fine of £50 if he neglected to nominate a new life within the specified time. There is no such provision here. The covenant to repair and yield up in repair is inconsistent with the idea of a perpetuity. In *Shinnick* v. *Beresford* (5), the declaration of intention was in similar terms to that in the present lease, and the Court held that there was no obligation on the tenants to renew. In *Alder* v. *Ward* (6),

(1) H. & J. 487.
(2) 1 Ir. Ch. R. 482, at p. 493.
(3) 2 Ball & B. 372.
(4) 25 L. R. Ir. 225.
(5) McDevitt's Land Cases, 516.
(6) 2 Jo. & Lat. 571, at p. 596.
(See also 8 Ir. Eq. R. 350, Rep.)

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Sir Edward Sugden, C., referring to the question of the right of a landlord to enforce a renewal against his tenant, says: "The equity in this country is one which has been called local; it is not universal; it is not inherent; and though it has been considered in some of the cases that the Tenantry Act is a declaratory statute, it is so only of the local equity, which does not prevail in England. It, therefore, is not founded upon the general rules of equity; but it has sprung up in this country alone, and has become the law of the country. Its object and that of the Tenantry Act was only the relief of the tenants, not that of the landlord. There is no mutuality in that respect, and in fact it is found that, in the majority of cases, the right of enforcing a renewal is given to the tenant, and there is no obligation imposed on the tenant to take a renewal." *Bayly* v. *The Corporation of Leominster* (1), and *Kane* v. *Hamilton* (2) show the view taken at the time of the lessee's obligations where there was no express covenant by him to renew. In Norton on Deeds (ed. 1906, at p. 116) the rule is stated that an express provision excludes the implication of any provision to the same effect. The presence in a lease of an express covenant negatives the existence of an implied covenant: *Murphy* v. *The Bandon Co-operative Agricultural and Dairy Society, Limited* (3). A covenant to accept renewals on the part of the lessee cannot be implied here.

J. E. Walsh, in reply:—

The words referred to in the declaration of intention do not show that it was intended that renewing should be optional. In *Trench* v. *Wallace* (4), where a covenant was implied, the provisions were, upon the lessee "first paying to the lessor" a fine if demanded, and "on the performance of the clauses, provisoes, and conditions therein contained." In *Ward* v. *McRoberts* (5) the similar provision occurred, "the lessee first paying, or causing to be paid, to the lessor" a fine. The very point was dealt with in *Foley* v. *Roland* (6), where the Vice-Chancellor says:—"It was

(1) 1 Ves. Jun. 475.
(2) 1 Ridgeway Ir. Parl. Cases, 186.
(3) [1909] 2 Ir. R. 510.
(4) [1904] 1 Ir. R. 290.
(5) 25 L. R. Ir. 324.
(6) [1898] 1 Ir. R. 311, at p. 318.

sought to use the words 'at the request,' &c., of the lessee as establishing that renewing was to be optional with the lessee. I do not admit the force of this argument, for the words may mean, and, I think, do mean, only that the lessor shall not be deemed to be in default unless upon a request not reasonably complied with. They cannot counteract the inferences from the clear unequivocal language of the deed to which I have referred." In the case of a trust for sale, the object of inserting analogous words is to insure that the act shall be done when the request is made, not to prevent it until request; *per* Sir William Grant, M.R., in *Thornton* v. *Hawley* (1). The covenant to repair is a usual covenant in leases for lives, and is not inconsistent with the otherwise clearly expressed intention of the parties to the lease. There was a similar covenant in *Ward* v. *McRoberts* (2). The principle of *Curry* v. *Stanley* (3) has been applied in *Ward* v. *McRoberts* (2) and *Trench* v. *Wallace* (4), which were not cases of sub-leases, and the intention, as appearing on the face of the lease of 1821, is even clearer than in those cases. *Shinnick* v. *Beresford* (5) has not been followed in any of the subsequent cases. It was cited in *Pilson* v. *Spratt* (6), as was also *Alder* v. *Ward* (7).

BARTON, J.:—

Dec. 1.

The question for decision is whether, under the indenture of lease for lives renewable for ever, dated the 1st September, 1821, the lessee is bound to accept a renewal. Two cases are in point, *Ward* v. *McRoberts* (2) and *Trench* v. *Wallace* (4). They are cases, like the present one, of leases for lives renewable for ever. Most of the other cases cited are cases of middlemen's leases with *toties quoties* covenants of renewal.

In the present case the *habendum* is for the lives of three named *cestuis que vie* " and of the survivor and survivors of them, and the natural lives and life of all and every such other person and persons as shall from time to time for ever hereafter be named and added thereto, or nominated and appointed as lives or as

(1) 10 Ves. 129.
(2) 25 L. R. Ir. 224.
(3) H. & J. 487.
(4) [1904] 1 Ir. R. 290.
(5) McDevitt's Land Cases, 516.
(6) 25 L. R. Ir. 5.
(7) 2 J. & Lat. 571, and 8 Ir. Eq. R. 350.

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cestuis que vie pursuant to the covenant for perpetual renewal hereof hereinafter contained." The words "for ever hereafter" and "perpetual" in the *habendum* are not to be over-looked. In *Sheppard* v. *Doolan* (1) Sir E. Sugden, C., when referring to *Taylor* v. *Pollard* (2), treated, as a material element in that case, the description, in the *habendum*, of a covenant for renewal as perpetual.

The covenant for renewal in the present case is indistinguishable from that in *Ward* v. *McRoberts* (3), except that it is strengthend by the addition of the words "so as the number of three lives may be always kept full according to the true intent and meaning of these presents." There was in the lease in *Ward* v. *McRoberts* (3) a covenant, not to be found in the present case, by the lessee upon the neglect to nominate a life of some other person within six months from the failure of a life to pay the sum of £50. If he neglected to pay such sum or nominate within twelve months, the lessor was to be at liberty to refuse to put in any other lives; and in such case the demised premises from and after the death of the lives then in being were to revert to the lessor. Yet Monroe, J., held that the fact that the lease gave this other remedy to the lessor in the event of the lessee failing to renew did not deprive him of his right to compel specific performance of the implied contract.

The Court acted upon the declaration of "the true intent and meaning of the parties that the lessee, his heirs, and assigns should for ever thereafter, unless through his or their fault and neglect, have a subsisting freehold estate." The declaration of true intent in the present case is as strong as in that or any of the cases.

The only distinguishing feature of this lease is the occurrence of the words "nominating and appointing a life and tendering renewals ready drawn and paying the fine and arrears, shall and may from time to time, and at all times for ever hereafter, have and enjoy the premises." It was contended that these words show that nominating and appointing a life and tendering renewals and paying the fine and arrears were to be conditions precedent. But in *Ward* v. *McRoberts* (3) there were similar

(1) 5 I. E. R. 6, 10.
(2) Lyne on Leases App. 62.
(3) 25 L. R. Ir. 224.

words—"he, the lessee, first paying or causing to be paid to the lessor" a fine. Such words may be inserted not so much to give the lessee an option as to define his preliminary obligations. They are no stronger than the words in *Trench* v. *Wallace* (1), "on the performance of the clauses, powers, and conditions therein contained." The present participle in a context like this has sometimes been construed to create, not a condition, but an implied covenant, as in the case of the common words "yielding and paying." The existence in this lease of a covenant to repair was also relied upon. But there was a covenant of that kind in *Ward* v. *McRoberts* (2).

The cases of *Frankfort* v. *Thorpe* (3), *Curry* v. *Stanley* (4), and *Pilson* v. *Spratt* (5) were cases of middlemen's leases with *toties quoties* covenants for renewal. The argument in favour of the obligation of the sub-lessee to accept a renewal was, perhaps, stronger in those cases. But the same principle has been applied in *Ward* v. *McRoberts* (2) and *Trench* v. *Wallace* (1) to leases for lives renewable for ever by the late Vice-Chancellor and the late Master of the Rolls. I am bound by those two cases, which I am unable to distinguish from the present one. I may add that *Shinnick* v. *Beresford* (6), of which we have only a scanty report, was cited in *Pilson* v. *Spratt* (5), and presumably considered by Monroe, J., when he decided the latter case.

The answer to the question will be "Yes," and there will be a declaration in the terms of the summons.

Solicitors for the plaintiff: *Little & Elgee.*
Solicitor for the Commissioners of Public Works: *W. G. Towers.*

R. W. L.

(1) [1904] 1 Ir. 290, at p. 291.
(2) 25 L. R. Ir. 224.
(3) 2 Ball. & B. 372.
(4) H. & J. 487.
(5) 25 L. R. Ir. 5.
(6) McDevitt's Land Cases, 516.

Ross, J.
1911.
Nov. 6.

Appeal.
Dec. 1.

IN THE MATTER OF THE ESTATE OF ANTHONY MACDERMOTT, HENRY R. VEREKER, AND OLIVIA CREAN LYNCH, OWNERS AND PETITIONERS: AND IN THE MATTER OF THE ESTATE OF CHARLES JAMES BAND, TRUSTEE IN BANKRUPTCY OF WILLIAM LIONEL FITZGERALD KENNEY, AND OTHERS, OWNERS: MARCELLA FITZGERALD KENNEY AND HELENA FITZGERALD KENNEY, PETITIONERS.

Practice—Costs charged by order of Court on an estate—Interest whether payable thereon and from what date.

Costs directed by a judgment or order to be charged on land bear interest from the date on which they become a charge.

By a judgment of the Master of the Rolls it was directed that certain lands should be charged with certain costs when taxed and ascertained. The lands and others were subsequently sold in the Land Judge's Court.

Held, reversing the decision of Ross, J., that interest at 4 per cent. on such costs should be allowed against the fund in Court from the date of taxation.

In re Drax; *Savile* v. *Drax* ([1903] 1 Ch. 781) followed.

QUESTION arising on the final schedule of incumbrances.

The petitioners in the present matter, Marcella Fitzgerald Kenney and Helena Fitzgerald Kenney, were the plaintiffs in an action entitled "1904, No. 256. In the High Court of Justice in Ireland, Chancery Division, Master of the Rolls, *Kenney* v. *Band.*" That action was brought for a declaration that under and by virtue of a settlement dated the 14th October, 1845, a sum of £8000 was well charged on the lands and premises the subject of Part I of the final schedule of incumbrances in the present matter, with interest thereon at the rate of £5 per cent., for portions for younger children, secured by a term of 500 years, created by the said settlement; and secondly, for a declaration that by the deed of appointment of the 11th August, 1870, the

sum of £5000, portion of the said charge of £8000, was validly appointed to Helena Fitzgerald Kenney, the mother of the plaintiffs.

Judgment was given in the said action on the 5th May, 1905, declaring, in accordance with the plaintiffs' claim, first, that the principal sum of £8000, secured by the term of 500 years created by the said settlement of 1845, was well charged on the lands in the said judgment mentioned (being the lands the subject of Part I of the final schedule of incumbrances in the present matter) in favour of the four daughters of the marriage, and that the said sum of £8000 became raisable on the 3rd December, 1881, with interest from that date at the rate of £5 per cent., and, after further declarations, it was by the said judgment declared that all the parties in the action, including the plaintiffs, were entitled to their costs in the action, said costs when taxed and ascertained to be charged upon and payable out of the lands and premises comprised in the term of years created by the said settlement of the 14th October, 1845 (being the lands the subject of Part I of the final schedule of incumbrances in the present matter), together with the freehold and chattel real premises purchased in pursuance of the power contained in the said settlement, and to be raised by the trustees of the said term. No express reference was made in the judgment as to whether such costs were to bear interest.

The costs of the plaintiffs by the said judgment charged on the lands the subject of Part I of the said final schedule of incumbrances amounted to the sum of £722 17*s.*, as appeared by the certificate of the taxation of said costs, dated the 27th May, 1909. The costs of the several defendants other than the defendant, James Fitzgerald Kenney, were taxed and amounted to £1151 7*s.* 9*d.* The costs of the defendant, James Fitzgerald Kenney, so charged by the said judgment, were not yet taxed, but amounted to £231 16*s.*

In the present matter the lands comprised in Part I of the final schedule of incumbrances were sold for £24,128.

The present application was brought by Marcella Fitzgerald Kenney, Helena Fitgerald Kenney, and James Fitzgerald Kenney for an order declaring the plaintiffs in said action entitled to interest

Ross, J.
1911.

In re MAC DERMOTT'S ESTATE.

upon the sum of £722 17*s.* charged upon the lands comprised in Part I of the final schedule of incumbrances from the date of the judgment of the Master of the Rolls in the action down to the date of the payment of said costs, and for an order declaring them and the said James Fitzgerald Kenney entitled to interest on £281 11*s.* 10*d.*, amount of their taxed and certified costs in the present matter from the dates of the respective certificates of taxation to the date of payment.

Jellett, K.C., with him *Hugh Kennedy*, for the applicants:—

The Act 3 & 4 Vict. c. 105, sect. 26, provides that every judgment debt due upon any judgment shall carry interest at 4 per cent. The Irish Order XLII, Rule 15, directs that every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff to levy the money due, and also interest thereon at £4 per cent. It was held in English cases that the interest runs from the date of the judgment, and not merely from the date of the certificate of taxation. Now, the question arises, what is to be done where the costs are charged on the estate and not due under an order of taxation: *Attorney-General* v. *Nethercote* (1). Where costs are directed to be added to moneys secured by a deed, and to stand charged upon the property, they carry interest at 4 per cent.: *Lippard* v. *Ricketts* (2). Kay, J., in *Eardley* v. *Knight* (3), expressed the opinion that if the costs are charged on the estate they are as good as the original security and bear interest. As a general rule, interest cannot be allowed on untaxed costs: *West* v. *West* (4); but in *West* v. *West* (4) there was no direction charging the costs. Though in an ordinary case interest is only payable on costs from the date of the certificate of taxation, here the costs are charged on the estate, which in effect is the same as if they had been added to the original charge, and, therefore, interest runs from the date of the order.

(1) 11 Sim. 529.
(2) L. R. 14 Eq. 291.
(3) 41 Ch. D. 537.
(4) 17 L. R. Ir. 49.

Oulton, K.C., for the solicitors having carriage of the sale:—

The Act 3 & 4 Vict. applies only to costs as between party and party. The Solicitors' Remuneration Act, 1870 (33 & 34 Vict. c. 28), s. 17, applies only to disbursements as between solicitor and client, and does not apply to a taxation of costs to be paid out of a fund in Court: *Hartland* v. *Murrell* (1). In the absence of special direction, interest is not payable on costs: *In re Marsden's Estate* (2). Here the client has only portion of the fund. His solicitor should not seek to charge interest against the shares of other parties in the fund. A security taken for untaxed costs gives a solicitor no right to interest: *Shannon* v. *Casey* (3).

D. J. O'Brien, for Isaiah Blaiberg, a puisne mortgagee:—

There is a difference between adding the costs to the security and merely having a charge for costs. The statement by Kay, J., in *Eardley* v. *Knight* (4), that if the costs were charged on the estate they might carry interest, is a mere *dictum*. Further on in the same case the learned Judge says that the costs must be added to the security in order to carry interest. As a general rule, interest is due on an agreement or under an order of Court. In the original charge there is nothing agreeing to interest on costs. If the argument on the other side is correct, then, if the original security provided for interest at 10 per cent., interest on the costs could be claimed at 10 per cent.

Ross, J.:—

I know of no authority deciding that a judgment charging costs on land or a fund necessarily carries interest (5). The cases relied on show the distinction. If the costs are directed to be added to the original security, then what is added is in the same position, as regards interest, as the original sum secured. In *Lippard* v. *Ricketts* (6) the costs were directed to be added to the moneys secured by the deed, and, therefore, interest was allowed

(1) L. R. 16 Eq. 285.
(2) 40 Ch. D. 475.
(3) Ir. R. 8 Eq. 307.
(4) 41 Ch. D. 537.
(5) *In re Drax*; *Savile* v. *Drax* ([1903] 1 Ch. 781) was not cited in the argument. REP.
(6) L. R. 14 Eq. 291.

Ross, J. 1911. *In re* Mac Dermott's Estate.

on the costs. I am of opinion that, unless the costs are directed to be added to the security, interest ought not to be allowed against an estate or a fund. The order in the action in the Rolls Court declared the plaintiffs entitled to the principal sums, with interest at the rate of £5 per cent., and gave the parties their costs incurred in the action, and directed the costs, when taxed and ascertained, to be charged upon, and payable out of, the lands and premises comprised in the term, and to be raised by the trustees. Not a word is said in that order about interest on the costs. Further, in my opinion, if interest were to be allowed on the costs incurred in the present matter, it could only run from the date of the certificate of taxation. The application must be refused.

D. M. S.

Appeal. Nov. 30. Dec. 1.

The Kenneys appealed to the Court of Appeal.

Jellett, K.C. (*Hugh Kennedy* with him), for the appellants, cited, in addition to the cases mentioned in the report of the hearing before Ross, J., *In re Drax*; *Savile* v. *Drax* (1).

Oulton, K.C., and *Sweetman*, for the solicitor having carriage of the sale, relied on the arguments reported in the report of the case in the Court below.

D. J. O'Brien, for Blaiberg, was not heard (2).

Dec. 1.

The Lord Chancellor:—

This is an important point; it raises the question as to the liability to interest on a sum for costs charged upon lands. The order of the late Master of the Rolls, pronounced in 1905, declared the costs we are dealing with were, when taxed and ascertained, to be charged upon and payable out of the lands and premises mentioned in the matter. It is true that no express provision for the payment of interest upon that charge was made,

(1) [1903] 1 Ch. 781.

(2) According to the practice in the Court of Appeal only two counsel can be heard on behalf of parties in the same interest.

and the question we have to consider is, whether the accepted law does not give to the person in whose favour such a charge is created a right to obtain interest without any express stipulation that it should be paid. There is no statement to the contrary in the order creating the charge. I confess that *Shannon* v. *Casey* (1) appeared to me at first to be in favour of the respondents, but upon looking at the cases of *Morgan* v. *Higgins* (2) and *Lawless* v. *Mansfield* (3), referred to in support of the decision in *Shannon* v. *Casey* (1), I find that those two cases are express decisions that interest upon a bill of costs is only payable upon the taxation of the costs; but they throw a great light upon the question involved here, namely, as to whether in the event of a charge being created for the costs interest should not be payable on the charge. In *Morgan* v. *Higgins* (2) the Vice-Chancellor said, at p. 284:—"But where the transaction was held by the Court to amount to this—that the deed was to be a valid security for whatever should be found due—he thought the right to the interest should follow as a matter of course." In *Lawless* v. *Mansfield* (3) part of the order made by the Lord Chancellor was to "declare that the said second mortgage shall stand as a security for such sum, as upon the taking of the accounts hereinbefore directed shall appear to have been fairly and justly due to the said defendant at the time of the execution of said mortgage. Reserve the question as to the validity of the said mortgage as a security for the costs contained therein, and the right to charge interest upon the said costs from the date of the said mortgage." Mr. Jellett has disclaimed any reliance upon the statutes. They relate to an entirely different subject-matter —the power of the Court to direct that interest should be paid upon costs. Mr. Jellett bases his claim upon the fact that a valid charge for the costs has been created upon the estate. In *Lippard* v. *Ricketts* (4), it was held that independently of the Attorneys Act, 1860, costs bore interest at 4 per cent., inasmuch as they were an equitable charge. Vice-Chancellor Bacon, in his judgment,

(1) I. R. 8 Eq. 307.
(2) 1 Giff. 270
(3) 1 Dr. & War. 557.
(4) L. R. 14 Eq. 291.

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said:—"In the case of *In re Kerr's Policy* (1) the Court seems to have proceeded on the theory that a debt secured by equitable mortgage will, unless something is said or may be implied to the contrary, carry interest; and it seems to follow that when the Court has once decided that there is a charge, the sum charged must bear interest." In *In re Drax*: *Savile* v. *Drax* (2). Cozens-Hardy, L.J., said, at p. 790—"In *Eardley* v. *Knight* (3), Kay, J., held that to entitle a man to interest on costs he must show that the costs are 'charged on the estate.'" In giving judgment, Collins, M.R., stated the principle as follows:—"It seems to me to be well established on the authorities, and the result of those authorities does not, indeed, appear to be disputed, that a Court of Equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge." Mr. Oulton was obviously pressed by those cases, and all he had to say was that there was some distinction to be drawn between cases of costs and other debts. I think, however, we have clear authority that no distinction is to be drawn. Therefore, I come to the conclusion that interest was payable upon this charge; and I think it is the accepted law that the interest is payable from the moment when the costs are taxed and ascertained. The order of Mr. Justice Ross must be reversed, and the appellants will be given their costs of this appeal and of their application in the Court below, both sets of costs to be paid out of the estate.

Holmes, L.J.:—

It is unnecessary for me to say much in addition to the judgment of the Lord Chancellor. I believe the law to be that when a Court of Equity declares a sum of money to be charged upon lands, the charge bears interest at the Court rate from the date on which the money is payable, although nothing be said about interest in the order creating the charge. If this is the law, the only question is whether the circumstance that the charge is for

(1) L. R. 8 Eq. 331.
(2) [1903] 1 Ch. 781.
(3) 41 Ch. D. 537.

costs makes any difference. I cannot see why it should; and if the Court has power to make costs a charge on land, as it certainly has, the order in the present case has done so. In my opinion the costs bear interest, but only from the date of taxation, as by the terms of the order the lands only then become subject to them.

CHERRY, L.J.:—

I concur. The claim for interest is based entirely on the ground that the costs are charged upon land by the order of the 5th May, 1905; and this appears upon the authorities sufficient to sustain it. "It is perfectly well settled," says Cozens-Hardy, L.J., in *In re Drax* (1), "that where you have an equitable charge on land to secure the payment of a debt it carries interest, although there is no mention of interest in the instrument of charge."

That case seems to me to be a conclusive authority in favour of the appellants' contention. It is right, however, to mention that it was not cited to Mr. Justice Ross. If it had been, I think his decision would have been different.

Solicitor for the appellants: *D. Purcell.*
Solicitors having carriage: *E. & G. Stapleton.*
Solicitor for Isaiah Blaiberg, a mortgagee: *P. A. Chance.*

W. G.

(1) [1903] 1 Ch. 781, at p. 795.

Appeal. 1911.

Nov. 23.

CONGESTED DISTRICTS BOARD for IRELAND, Landlords; LUKE ARMSTRONG, Tenant (1).

Land Law (Ireland) Acts—Congested Districts Board—Right of resumption of holding—Limitation of right of resumption—Purposes of resumption—Migration and enlargement of holdings—Land Law (Ireland) Act, 1881, *ss.* 5, 8 (3)—*Land Law (Ireland) Act*, 1896, *s.* 3 (1)—*Irish Land Act*, 1903, *s.* 83.

The power of the Court to authorize resumption of a holding by the Congested Districts Board for the purposes of migration or the enlargement of holdings under section 83 of the Irish Land Act, 1903, is not limited by the provisions of section 8 (3) of the Land Law (Ireland) Act, 1881, prohibiting (save in the excepted cases) resumption of a holding by a landlord during a statutory term in a present tenancy consequent on the first determination of a judicial rent of that tenancy by the Court.

Appeal by the tenant from an order of Mr. Commissioner FitzGerald.

The holding consisted of 139a. 1r. 33p. in the county of Sligo, on which a fair rent of £42 had been fixed for a first statutory term by an order of the Land Commission, dated the 29th January, 1887, and no application to have a fair rent fixed for a second statutory term had been made. The Congested Districts Board, the landlords, on the 7th March, 1910, served an originating notice of an application to the Land Commission for an order authorizing the resumption of the holding "for a reasonable and sufficient purpose, namely, for the purposes of migration or the enlargement of holdings," under section 83 of the Irish Land Act, 1903. The Sub-Commission, by an order of the 25th June, 1910, granted this application, authorizing the resumption upon payment to the tenant of £1030 in full compensation. This order was affirmed by an order of Mr. Commissioner FitzGerald of the 24th June, 1911; hence the appeal.

(1) Before The Lord Chancellor, and Lords Justices Holmes and Cherry.

Jellett, K.C., and *Leonard*, for the appellant:—

The order authorizing the resumption of the holding was made without jurisdiction. Sub-section 6 of section 5 of the Act of 1881 provides that "during the continuance of a statutory term" the Court may, "save as hereinafter provided," authorize the resumption of a holding by the landlord for the purposes mentioned in the section. The words "save as hereinafter provided" refer to the 3rd sub-section of section 8 of the Act, which, unless in the two excepted cases, prohibits such resumption "during the statutory term in a present tenancy consequent on the first determination of a judicial rent of that tenancy by the Court." The only effect of section 83 of the Irish Land Act, 1903, was to add two purposes—migration and the enlargement of holdings—to those mentioned in section 5 of the Act of 1881; but, save as to these, the new section gave the Board no further or other rights than those of an ordinary landlord, and in the circumstances of this case an ordinary landlord could not be empowered to resume the holding, as there is no statutory term in existence: *Callwells* v. *Reilly* (1).

Under section 3 (1) of the Act of 1896, on the expiration of a statutory term in a present tenancy, the tenancy until determined continues a present tenancy subject to the same rent and conditions (including the statutory conditions) as during the statutory term; but the right of a landlord to resume a holding under section 5 of the Act of 1881 is not a "condition," statutory or otherwise; and, even if it could be so held, the former statutory term in this holding was, under section 8 (3) of the Act of 1881, not subject to any right of resumption, and the present tenancy now existing could not, accordingly, continue subject to such right: *Callwells* v. *Reilly* (1).

The Solicitor-General (*Ignatius J. O'Brien, K.C.*), *Ronan, K.C.*, and *E. Coll*, for the respondents:—

Callwells v. *Reilly* (1) only decided that the conditions affecting a first statutory term are, on its termination, projected forward,

(1) [1910] 1 I. R. 121.

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and continue to affect the present tenancy, and that case has no application here. The right of resumption provided for by section 5 of the Act of 1881 would, but for the partial limitation created by section 8 (3), be general, and one affecting every tenancy held for a statutory term, and that limitation does not in any way affect the right of resumption given to the Congested Districts Board by section 83 of the Act of 1903. This is a new clause in a new Act of Parliament, creating powers which could not have been contemplated by the Legislature in enacting section 8 (3) of the earlier Act, and which powers are not, in terms, subject to any limitation. The purposes contemplated by section 83 of the Act of 1903 are entirely different from those mentioned in section 5 of the Act of 1881. The new powers of authorizing resumption are given for important public purposes, distinct and entirely different from those mentioned in the earlier section, and not confined to "the good of a holding or an estate." The clog on resumption imposed by section 8 (3) of the Act of 1881 ought not, accordingly, be held to affect the respondents' right of resumption for the purposes mentioned in section 83 of the Act of 1903.

THE LORD CHANCELLOR :—

Under section 5, sub-section (6), of the Land Law (Ireland) Act, 1881, the resumption of a holding may be authorized for a number of purposes, some of which, in my opinion, are not subject to the limitation arising from the phrase "having relation to the good of the holding or of the estate." It is not necessary, however, for the Court to arrive at a decision on that point, because section 83 of the Land Act, 1903, plainly adds to the category of cases mentioned in the section of the earlier Act two additional and independent purposes for which resumption may be ordered, and which are in no way qualified by, and need not be regarded with reference to, the words "having relation to the good of the holding or of the estate." To test the question raised one cannot do better than to assume the existence of the Congested Districts Board in 1881, and that section 5 (6) of the Act of 1881, as originally passed, had included substantially the provisions of

section 83 of the Act of 1903, giving power to the Court to authorize the Congested Districts Board to resume holdings for the unqualified purposes of migration or the enlargement of holdings. The case has been argued on that basis, and that is in effect the present situation. The controversy, then, is as to the application of section 8 (3) of the Act of 1881. I do not think that the prohibition of that section would have had in the circumstances assumed, or that it has in the actual facts to-day, any application whatever to the resumption of holdings by the Congested Districts Board for the purposes of migration or the enlargement of holdings. Nor is there in any other part of the Acts any limitation upon the power of the Court at any time to give the necessary authority to that body to resume a holding for the particular purposes mentioned. There was, accordingly, in my opinion, power to authorize the resumption of the present holding for the purpose of section 83 of the Act of 1903, and the appeal must be dismissed with costs.

HOLMES, L.J.:—

I agree. A critical examination of sections 5 and 8 of the Act of 1881 is, in my opinion, quite sufficient to enable us to arrive at an accurate conclusion on the question that has been argued here.

In the first of these sections a power is given to a landlord to resume possession of a holding for certain purposes and under certain conditions; but section 8 places a limit on that power during the continuance of a first statutory term.

Another Act of Parliament was passed in 1903, which, for the benefit of the Congested Districts Board, adds to the former purposes for which a holding could be resumed by the landlord two additional ones, bearing no resemblance to those mentioned in the earlier Act, and which are indeed inapplicable in the case of an ordinary landlord.

Under these circumstances I am unable to hold that the limitation placed by section 8 on the right of resumption, which is confined to the purposes mentioned in section 5 (6) of the Act of 1881, can be extended so as to affect the operation of section 83 of the Act of 1903.

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CHERRY, L.J. :—

I agree. By section 83 of the Act of 1903, two additional purposes are specified for which, when the Congested Districts Board are landlords, the resumption of a holding under sect. 5 (6) of the Act of 1881 may be authorized, over and above those which are mentioned in the latter section. These purposes are not, in my opinion, affected by what has been called, in the course of the argument, the "clog on resumption" imposed by section 8 (3) of the Act of 1881. That sub-section does not, and cannot, apply to the case of resumption by the Congested Districts Board for one or other of these additional purposes. The decision of this Court in *Callwells* (*landlords*); *Reilly* (*tenant*) (1), therefore has no bearing upon the present case.

Solicitor for the appellant: *M. J. Howley.*
Solicitor for the respondents: *J. O'Connor.*

R. ST. J. C.

(1) [1910] 1 I. R. 121.

IN THE MATTER OF THE ESTATE OF ALFRED O'BRIEN AND OTHERS (1).

Appeal.
1911.
Nov. 24.
Dec. 4.

Land Purchase Acts—Apportionment and redemption—Lands sold, subject to larger superior head-rent than immediate head-rent—"Equitable" apportionment—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 31 (3)—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 62 (3).

The lands of G., held by the vendors under a sub-fee-farm grant at a rent of £12 18*s.*, were sold to the occupying tenants under the Land Purchase Acts for £878. The said lands, together with the lands of B., were subject to a superior fee-farm rent of £47 16*s.* 6*d.* The lands of G. comprised 167 acres, the Poor Law Valuation being £57 3*s.*, and the judicial rents formerly paid by the occupying tenants, £57 3*s.* The lands of B., which were in hands, comprised 222 acres, the Poor Law Valuation being £57 15*s.*, and the "fair valuation," according to the evidence of a valuer, £68 18*s.* 6*d.*

The immediate rent of £12 18*s.* was redeemed out of the purchase-money at £335, and in dealing with the superior rent Wylie, J., made an order, pursuant to section 62 (3) of the Irish Land Act, 1903 (2), that the sum of £12 18*s.*, portion of the superior rent of £47 16*s.* 6*d.*, be exclusively charged in respect of the said sum of £335, and be redeemed at that amount, and that the sum of £34 18*s.* 6*d.*, balance of the superior rent, be exclusively charged on the lands of B.

On appeal from said order by the owner of the superior rent, claiming that, on the facts disclosed, section 62 (3) was inapplicable, and that his superior rent should be apportioned according to the value of the lands of G. and B. respectively, and that the proper proportion thereof, when so apportioned on the lands of G., should be redeemed out of the purchase-money thereof :—

Held, by the Court of Appeal, that the order of Wylie, J., should be affirmed.

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(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) Section 62 (3) enacts : "Where in the like case (*i. e.*, where any land sold under the Land Purchase Acts is subject, in conjunction with other lands, to any superior interest) the Court is satisfied that the land sold is entitled to be indemnified against any claim in respect of a superior interest by other lands, and that the other lands are a sufficient security therefor, the Court may, upon such terms (if any), and in such manner as appears equitable, exclusively charge the whole of the superior interest upon the other lands."

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In re O'Brien's Estate.

Per Holmes and Cherry, L.JJ., on the ground that the order was, in effect, an ordinary apportionment and redemption order, and that the apportionment of the superior rent, as carried out by the order, was "equitable" within the meaning of section 31 (3) of the Land Law (Ireland) Act, 1896.

Per Cherry, L.J.: Section 62 (3) of the Irish Land Act, 1903, is primarily, if not exclusively, intended for cases where a complete indemnity, by covenant or otherwise, exists against the whole of a rent or rentcharge payable out of the lands.

Appeal by Guillamore O'Grady from an order of the Judicial Commissioner, dated the 28th June, 1911, seeking that said order be reversed, and in lieu thereof for an order declaring that the appellant was entitled to have his head-rent of £47 16*s.* 6*d.*, in said order mentioned, apportioned as between the lands sold in this matter and the other lands liable thereto, according to the value of the said lands, respectively, and to have the proper proportion of his said head-rent when so apportioned on the lands sold in this matter redeemed out of the purchase-money thereof.

By lease, dated the 9th May, 1723, the lands of Gaurus (being the lands sold in this matter), containing 167 acres, and part of Bunnow and Gortataggart, containing 222 acres, situate in the barony of Bunratty and county of Clare, were demised by a predecessor in title of the appellant for the lives therein named, with a covenant for perpetual renewal, at the yearly rent of £24, together with heavy renewal fines on the fall of each life.

By sub-lease, dated the 13th April, 1763, the said lands of Gaurus were sub-demised by the lessee in the last-mentioned lease, for the lives therein named with a covenant for perpetual renewal, on payment of a peppercorn on the fall of each life, at the yearly rent equivalent to £12 18*s.* sterling. The sub-lease was renewed in 1811. In 1854, the lessee's interest in the sub-lease was sold in the Incumbered Estates Court, and on the 21st June, 1854, was conveyed to J. S. O'Brien, a predecessor in title of the vendors in this matter, Alfred O'Brien and others. No mention was made in the Incumbered Estates Court conveyance of the superior rent. The sub-lease and renewal were not forthcoming, and there was no evidence of their contents beyond the recitals in the Incumbered Estates Court conveyance of the 21st June, 1854. On the 29th June, 1854, the sub-lease was converted into a fee-

farm grant, at the same rent, *i.e.*, £12 8*s*. Subsequently, in 1854, the interest of the lessee under the original lease of the 9th May, 1723, was put up for sale in the Incumbered Estates Court, and by order of the Commissioners for the sale of Incumbered Estates, dated the 24th October, 1854, it was directed that the said lease should be converted into a fee-farm grant, upon the terms that the fee-farm rent should be the sum equivalent to £47 16*s*. 6*d*. (as now adjusted) in lieu of the rent, renewal fines, and reservations, reserved by the said original lease, and that the following covenants therein contained should be deemed to be still subsisting, viz., covenants on the part of the owner of the said lands for payment of rent, and to keep the premises in repair, and a covenant on the part of the owner of rent for quiet enjoyment. By Incumbered Estates Court conveyance, dated the 22nd February, 1861, the grantee's interest thereunder, in said conveyance described as the said fee-farm rent of £12 18*s*., created by said indenture of the 29th June, 1854, and the said lands of Bunnow and Gortataggart, were conveyed to the predecessors in title of Catherine Clune and others, subject to the said fee-farm rent of £47 16*s*. 6*d*., and to the covenants on the part of the owner of the lands in the said order mentioned, and with the benefit of the covenant on the part of the owner of the said fee-farm rent of £47 16*s*. 6*d*.

The said rent of £47 16*s*. 6*d*. had since been regularly paid by Catherine Clune and her co-owners, and their predecessors in title, to the appellant and his predecessors.

In 1905, the vendors, Alfred O'Brien and others, proceeded to sell the lands of Gaurus to the occupying tenants under the Land Purchase Acts, and in 1910 the purchase-money, amounting to £878, was advanced.

On the 13th June, 1911, upon the application of the vendors, Wylie, J., made an order redeeming the sub-fee-farm rent of £12 18*s*., and fixing the redemption-price thereof at £335 8*s*. on consent entered into between the vendors and Catherine Clune, and the other co-owners of said rent.

On the 28th June, 1911, Catherine Clune, and her co-owners, applied to Wylie, J., for an order that the said redemption-price of £335 8*s*. be paid out to them without regard to the appellant's

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head-rent of £47 16*s.* 6*d.*, or, in the alternative, that the appellant's head-rent of £47 6*s.* 6*d.* be apportioned by placing £12 18*s.* on the lands of Gaurus, sold in this matter, and £34 18*s.* 6*d.* on the lands of Bunnow and Gortataggart, and that the £12 18*s.*, when so apportioned, be redeemed at the sum of £335 8*s.*

From the affidavit of Richard A. MacNamara, the vendors' solicitor, it appeared that the Poor Law Valuation of the lands of Gaurus, which contained 167 acres, was £57 3*s.*, of which sum £3 12*s.* was on buildings, and that the judicial rents payable by the occupying tenants to the vendors out of said lands prior to the sale amounted to £57 3*s.*; and, further, that the poor law valuation of the lands of Bunnow and Gortataggart, which contained 222 acres, was £57 15*s.*, of which sum £6 18*s.* was on buildings, and that the said lands of Bunnow and Gortataggart were in the occupation of Catherine Clune and her co-owners. An affidavit was sworn by Patrick O'Donnell, a valuer, on behalf of Catherine Clune and her co-owners to the effect that £68 18*s.* 6*d.* was "a fair valuation" of the lands of Bunnow and Gortataggart. In the affidavit of Catherine Clune and her co-owners it was submitted that the intention of the Incumbered Estates Court conveyance of the 22nd February, 1861, was to exempt the lands of Gaurus from all liability in respect of the appellant's head-rent of £47 16*s.* 6*d.*, and to transfer the entire liability for said head-rent to the lands of Bunnow and Gortataggart.

On the application Wylie, J., made an order in the following terms:—"It is ordered by the Court, pursuant to section 62 (3) of the Irish Land Act, 1903, that the sum of £12 18*s.*, portion of the said head-rent of £47 16*s.* 6*d.*, be, and the same is, hereby exclusively charged in respect of the said sum of £335 8*s.*, being the redemption-price of the said fee-farm rent of £12 18*s.*, and that the sum of £34 18*s.* 6*d.*, balance of the said head-rent of £47 16*s.* 6*d.*, be, and the same is, hereby exclusively charged on the residue of the premises liable thereto; and the Court doth further order that the said sum of £12 18*s.*, so charged in respect of the said redemption-price of the said fee-farm rent, be redeemed at the price or sum of £335 8*s.*"

From this order the appellant now appealed.

Jellett, K.C., and *J. E. Walsh*, for the appellant :—

The order appealed from is inequitable to the appellant, as (1) his security is thereby greatly depreciated; instead of a head-rent of £47 6*s.* 6*d.* secured on lands the poor law valuation of which is £114 18*s.*, he is left with a rent of £34 18*s.* 6*d.* secured on lands the poor law valuation of which is £57 15*s.*; and (2) the lands on which the balance of his rent is charged are in the hands of his grantees, and, if sold hereafter under the Land Purchase Acts, he would be the vendor, and the rate of purchase of the £34 18*s.* 6*d.* would be that of a non-judicial rent in County Clare, *i.e.*, very much lower than if the rent were redeemed as a head-rent.

The order is objected to on the grounds—(*a*) It is based on the assumption that the appellant's rights, as regards redemption, are limited to those of his grantee. The sub-lease is not forthcoming. It does not appear why the lessee reserved so low a rent as £12 18*s.* when granting the sub-lease. If he had accepted a large fine, and reserved a nominal rent, could it now be suggested that the appellant's rights were limited to the redemption-price of the nominal rent? and (*b*) section 62 (3) is inapplicable to the facts of the case, as (1) there is no evidence in any of the documents of title that the lands sold are entitled to be indemnified against the appellant's head-rent by the other lands comprised in the head fee-farm grant; (2) assuming that, from the terms of the sub-lease, it is possible to imply a covenant by the sub-lessor to indemnify the sub-lessee against any claim for rent over and above the £12 18*s.* thereby reserved, the sub-section would not apply, as it would not be possible to charge "the whole of the superior interest" on other lands unless and until the part of the appellant's head-rent against which the implied indemnity is assumed to exist (*i.e.* £34 18*s.* 6*d.*) has first been ascertained and fixed by apportionment. The sub-section is not an apportionment sub-section. Apportionment must be carried out in the manner prescribed by Order XX of the Rules of March, 1897, under the apportionment sections of the Acts, *i.e.*, section 10 of the Act of 1885, sections 15 and 16 of the Act of 1887, and section 31 (3) of the Act of 1896. The order of Wylie, J., does not purport to be made under the

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apportionment sections, but is expressly made pursuant to section 62 (3) of the Act of 1903; and (3) assuming that "the whole of the superior" interest was capable of being charged, the other lands are not a "sufficient security" for £34 18*s.* 6*d.*, within the meaning of the sub-section, the poor law valuation being only £57 15*s.* In *O'Keefe's Estate* (1) the Master of the Rolls, when Judicial Commissioner, dealing with the question of security, says:—"I do not wish it to be understood that when the other lands are a sufficient security for the superior interest, I would make an order which would leave a bare or a small margin, even if the rental were a second term rental." Here there is only a small margin.

The rent of £47 16*s.* 6*d.* should, accordingly, be dealt with under the ordinary apportionment sections, and the vendors would be entitled to a rentcharge on the other lands for any sum above £12 18*s.* that they are obliged to redeem, under s. 33 (4) of the Act of 1896. The appellant is entitled to have his rent apportioned according to the value of the lands sold and the other lands liable thereto respectively: *In re Comyns* (2). This is the only basis that would be "equitable" to him within the meaning of section 31 (3) of the Act of 1896. Under the general practice, government valuation is taken as the criterion of value. By Order XX of the Rules of March, 1897, it is directed that a certificate of tenement valuation shall be lodged with the statement of facts. On this basis £24 11*s.* should be apportioned on the lands sold and redeemed, and £23 5*s.* 6*d.* should be apportioned on the other lands. The vendors would then be entitled to a rentcharge for £11 13*s.* on the other lands, which would be puisne to the appellant's rent of £23 5*s.* 6*d.*: *De Vesci* v. *O'Connell* (3). This course would be "equitable" to Catherine Clune and her co-owners, who, instead of paying £34 18*s.* 6*d.* to the appellant, would pay £23 5*s.* 6*d.* to the appellant and £11 13*s.* to the vendors. It would also be "equitable" to the vendors, who would get a rentcharge of £11 13*s.* instead of the equivalent amount of purchase-money. No doubt, the costs would fall on the vendors, but the bonus was intended to compensate them for the necessary costs of sale.

(1) 39 Ir. L. T. R. at p. 88.
(2) 11 Ir. Ch. R. 334.
(3) [1908] 1 Ir. R. 452.

Clarence Corvan, for the vendors:—

The order of Wylie, J., was clearly right under the circumstances. Even if there was no express covenant for indemnity in the sub-lease, under the covenant for quiet enjoyment there would be an implied covenant for an indemnity against any claim for rent above £12 18*s*. This would create an implied indemnity against £34 18*s*. 6*d*. of the appellant's head-rent, and would be a sufficient indemnity within section 62 (3) of the Act of 1903. As to the question of security, the other lands are ample security, as is shown by the fact that the balance of the appellant's head-rent must always have been paid out of them. On Patrick O'Donnell's valuation of £68 18*s*. 6*d*. the balance is secured almost twice over. There is no provision in the Land Purchase Acts that apportionment must be made according to value. Under section 31 (3) of the Act of 1896 the powers of apportionment and redemption are to be exercised in such manner as shall appear equitable. In *Thompson's Estate* (1) Ross, J., held that "equitable" meant equitable to all persons interested in the estate. It would not be equitable to the vendors to compel them to redeem a larger rent than they have heretofore paid, and that they should be put to the cost and inconvenience of obtaining an order under section 33 (4) of the Act of 1896. The appellant's head-rent *qua* £12 18*s*. has been redeemed at twenty-six years' purchase. If a larger amount were redeemed, he would not be entitled to so high a rate of redemption.

Michael Comyn, for Catherine Clune and her co-owners, supported the vendors' contention. If there is no indemnity sufficient to bring the case within section 62 (3) of the Act of 1903, there would be no indemnity which would enable the vendors to get an order under section 33 (4) of the Act of 1896. Wylie, J., was satisfied that the case came within section 62 (3), and, as part of the "equitable" treatment which he considered the appellant entitled to under the sub-section, provided that he should be paid the full redemption-price of £12 18*s*., which would otherwise have been paid to the Clunes.

J. E. Walsh replied.

(1) [1901] 1 Ir. R. 393.

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Dec. 4.

The Lord Chancellor :—

The appellant in this case was the owner of three denominations of lands, including the lands of Gaurus, containing 167 acres, and which were the lands sold under the Land Purchase Acts by the vendors in this matter. The other lands contained about 222 acres. By an old lease dated May 9th, 1723, all the lands were leased by appellant's predecessor on a lease for lives renewable for ever at a yearly rent of £24 together with renewal fines. In 1763, the lessee sub-demised the lands of Gaurus at the yearly rent of £12 18*s.*, and in June, 1854, the vendor's predecessor obtained a fee-farm grant of these lands at the same rent. Some years afterwards in the course of proceedings in the Incumbered Estates Court the interest of the lessee under the original lease of May 9th, 1723, was sold, and by the conveyance of the Court, dated February 22nd, 1861, was conveyed in fee-farm at the rent of £47 16*s.* 6*d.*, in lieu of the old rent of £24 and the renewal fines. The grantees named in the Incumbered Estates Court conveyance are now represented by Catherine Clune, and seven others whom it is unnecessary to name. Since that, the vendors and their predecessors have paid the rent of £12 18*s.*, reserved by their grant, to the persons entitled under the Incumbered Estates Court conveyance of February 22nd, 1861.

The vendors recently sold their lands under the Land Purchase Acts to their tenants for the gross sum of £878, and the rent of £12 18*s.* payable by the vendors was redeemed at the sum of £335 8*s.* The £878 has been lodged in Court, and is available for the redemption price of the rent.

By notice of motion, as I gather the facts, in the month of June, 1911, Catherine Clune and the others entitled to the interest under the Incumbered Estates Court conveyance of February 22nd, 1861, and to whom the rent of £12 18*s.* was payable by the vendors, applied for payment to them of the redemption price of £335 8*s.* Affidavits in support of the motion were made by Richard A. MacNamara, by Catherine Clune, and the other persons jointly entitled with her to the rent, and by a valuer named Patrick O'Donnell, who gave evidence as to the value of the other lands comprised in the

Incumbered Estates Court conveyance. The application must have been made under section 62 (3) of the Land Act of 1903, and it was founded, first of all, on the contention that the lands sold were entitled to an indemnity against the head-rent by the lands unsold, and on the allegation that the latter were a sufficient security for the head-rent. In these circumstances it must have been argued that section 62 (3) was applicable. We have no record of the learned Judge's judgment, but I have studied the papers laid before the Court, and the conclusion I have come to as to what occurred is derived from them. I refer first of all to the order made by Wylie, J., dated the 28th day of June, 1911 The affidavit of Catherine Clune, and her co-owners, after referring to the Incumbered Estates Court conveyance of February 22nd, 1861, presented plainly their submission to the effect that the intention of the Incumbered Estates Court conveyance was to exempt the lands of Gaurus from all liability in respect of the rent of £47 16*s.* 6*d.*, and to transfer the entire liability for the said rent to the remainder of the lands, containing, as already stated, 222 acres. The valuer's affidavit put the value of these lands at £68 18*s.* 6*d.* I take it that he meant that they would yield that yearly sum in rent. It is, to my mind, plain that the proceedings were based on the admission that the lands of Gaurus were entitled to be indemnified by other lands against the head-rent, and on the contention that the lands unsold were a sufficient security for that rent. The appellant appeared by counsel on the motion, and in the result Wylie, J., made the order now appealed against. His order is expressly stated to be made in pursuance of section 62 (3) of the Irish Land Act, 1903, and it was declared by him in the following terms:—"That the sum of £12 18*s.*, portion of the said rent of £47 16*s.* 6*d.*, be, and the same is, hereby exclusively charged in respect of the said sum of £335 8*s.*, being the redemption price of the said fee-farm rent of £12 18*s.*, and that the sum of £34 18*s.* 6*d.*, balance of the said head-rent of £47 16*s.* 6*d.*, be, and the same is, hereby exclusively charged on the residue of the premises liable thereto, and the Court doth further order that the said sum of £12 18*s.*, so charged in respect of the said redemption price of the said fee-farm rent, be redeemed at the price or sum of £335 8*s.*"

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It is, I think, plain that the learned Judge did not accept the contention of Catherine Clune, and the joint owners acting with her, in claiming the payment to them of the redemption price of £335 8*s*. I come to the conclusion that Wylie, J., did accept the view that the lands of Gaurus which were sold were entitled to be indemnified by the other lands, and I do not recall any argument in this Court to the contrary. Treating, however, the matter as section 62 (3) provides, upon equitable terms, I conclude that the learned Judge decided that the money, namely £335 8*s*., ought in equity to go to the appellant as the owner of the head-rent, and that it should redeem that rent to the extent of £12 18*s*. He also was apparently satisfied, upon the affidavits read on the motion, that the balance of the head-rent, namely, £34 18*s*. 6*d*., would be sufficiently secured by the other lands, and accordingly charged them exclusively with it. I do not think there can be any doubt that the learned Judge pursued that course; and for myself, on the documents in the case, and having regard to the arguments in this Court, I see no reason to differ from his view and the order he made on the application to him.

Mr. Jellett, in opening the appeal, did not, as I remember, make the contention which was presented by Mr. Walsh, his junior counsel, in the course of his able argument, namely, that section 62 (3) was not applicable, on the ground that it only applied when, in the result, the whole head-rent was charged on the unsold lands. That, I think, is altogether too limited a view to take of the section. I agree with the view taken manifestly by Wylie, J., that, as part of the equitable treatment he was to give the appellant, he ought to provide that the appellant should get the £335 8*s*., the money in Court, which represents twenty-six years' purchase of the amount £12 18*s*. It is in his interest to be paid it, with the result, of course, that the head-rent should be abated accordingly. The superior interest thereby at once becomes reduced from £47 16*s*. 6*d*. to £34 18*s*. 6*d*., so that in fact the whole outstanding superior interest becomes chargeable on the unsold lands.

I am, accordingly, of opinion that the learned Judge was right, and that the appeal should be dismissed.

HOLMES, L.J. :—

The lands sold in this matter were part of the lands of Gaurus in county Clare, held in fee-farm by Mr. Alfred O'Brien and others, subject to a fee-farm rent of £12 18*s.*, payable to Catherine Clune and others who were owners thereof, and of additional lands of Bunnow and Gortataggart in fee-farm, subject to a fee-farm rent of £47 16*s.* 6*d.*, payable to Mr. Guillamore O'Grady. The result of this was, that while Mr. O'Brien paid his rent of £12 18*s.* to Catherine Clune and her co-owners, the latter paid Mr. O'Grady his rent of £47 16*s.* 6*d.* Of course all the lands—both the lands of Bunnow and Gortataggart, held by Catherine Clune and her co-owners, and the lands of Gaurus, held by Mr. O'Brien—were subject to Mr. O'Grady's rent; but as a matter of fact, it was never necessary for him to seek payment from Mr. O'Brien, who seems not to have been aware of the existence of the superior rent.

Mr. O'Brien sold to his tenants under the Land Purchase Acts at the price of £878; and by order of the 13th June, 1911, Wylie, J., fixed the redemption price of the rent of £12 18*s.* at the sum of £335 8*s.*

On the 28th June, 1911, Wylie, J., made another order. I have not seen the notice of this application, but counsel for Mr. O'Grady, the Clunes, and Mr. O'Brien were heard, and it was then ordered, pursuant to section 62 (3) of the Irish Land Act, 1903, that the sum of £12 18*s.*, portion of the head-rent of £47 16*s.* 6*d.*, be charged exclusively in respect of the £335 8*s.*, the redemption price of the rent of £12 18*s.*, and that the sum of £34 18*s.* 6*d.* be exclusively charged on the residue of the premises liable thereto. It was further ordered that the said sum of £12 18*s.* should be redeemed at the price of £335 8*s.* The effect of this, as I understand it, was to apportion the rent of £47 16*s.* 6*d.* into two parts, one being £12 18*s.* to be exclusively charged on the premises out of which it issued, and to be redeemed at the sum mentioned, the other being £34 18*s.* 6*d.* to be exclusively charged on the residue of the premises liable thereto. The appeal is from this order.

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The apportionment and redemption of superior interests are difficult but necessary steps in carrying out sales under the Irish Land Purchase Acts, and can only be satisfactorily dealt with by the Judge who has constant experience of them, and who has the assistance of competent inspectors and examiners. Therefore, speaking for myself, I should be very slow to differ from the conclusion arrived at by him, unless I was satisfied that he had exceeded his jurisdiction or fallen into some error of law.

That Wylie, J., had jurisdiction to make the order, as I have interpreted it, cannot, I think, be doubted. Apart from section 62 (3) of the Act of 1903, section 31 (3) of the Act of 1896 declares that the powers of apportionment and redemption given to the Land Commission by the Acts of 1885 and 1887 shall extend to superior interests and be exercised in such manner as shall appear equitable, and shall not be limited to an apportionment between the land sold and the residue of the land subject to the superior interest. This is not disputed by the appellant, for the notice of appeal asks to have the head-rent of £47 16*s.* 6*d.* apportioned as between the lands sold and the other lands liable thereto according to the value of the said lands respectively, and to have the head-rent apportioned on the first-mentioned lands redeemed out of the purchase-money thereof. What is asked for on the appeal is, that the apportionment should be made according to the value of the lands respectively. In the course of the argument, value was translated by counsel as meaning the government valuation—often a most misleading standard of the true value of both lands and buildings; but we have no other evidence of value from the appellant. I cannot find any provision in the statutes that the apportionment is to be according to value. The words of the section are, that the power of apportionment shall be exercised in such manner as shall appear equitable; and, in a case like the present, what equity requires is that the lands charged with the apportioned rent should be a good security therefor. If this were the conclusion of Wylie, J., he had evidence to justify it. He had the testimony of an expert who values the unsold lands at about £69, less than six shillings an acre. This seems to me a moderate valuation, but this is a matter about which Wylie, J., knows much more than I do.

There is, moreover, another fact of great importance in this country. Mr. O'Grady and his predecessors in title have been receiving the rent of £47 16*s.* 6*d.* Of this rent, Mr. O'Brien and his predecessors in title have only contributed through Catherine Clune and her co-owners the sum of £12 18*s.* each year; and yet those owners in good times and bad times have always paid, presumably out of the rest of the lands, the balance of the head-rent. Anyone acquainted with Ireland would need no stronger proof that the lands in the hands of the Clunes are an excellent security for the payment of £34 18*s.* 6*d.*, the amount of future head-rent. I cannot say whether this influenced Wylie, J., but it is enough to support his order, which causes the minimum of change in the relations of the several parties, and prevents the necessity of the complicated and, in my opinion, unsatisfactory results which would follow from allowing the appeal.

CHERRY, L.J. :—

The order of Wylie, J., in this matter which has been appealed from purports to be made under the powers conferred by s. 62 (3) of the Irish Land Act, 1903. I have some doubt whether the case comes at all within that sub-section, which appears to me to be primarily, if not exclusively, intended for cases where a complete indemnity, by covenant or otherwise, exists against the whole of a rent or rentcharge payable out of the lands.

I think, however, that the order may be supported as an ordinary order for the apportionment and redemption of a rentcharge under the powers conferred by section 16 of the Land Act, 1887, and section 31 of the Land Act, 1896.

The owner of the superior rent contends that he is entitled to have it apportioned between the lands sold and the other lands liable thereto, "according to the value of the said lands respectively." I do not think that he has any legal right to have it apportioned strictly in this proportion. None of the statutes providing for apportionment either on sales in the Landed Estates Court or in the Land Commission requires the apportionment to be made exactly in proportion to the value of the lands charged with each portion respectively. No doubt, as a general

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rule, this is the fair and just course to adopt, but all that the law requires is that the power of apportionment shall be exercised "in such manner as shall appear equitable" (Land Act, 1896, section 31 (3)). I entirely concur in the view taken by Ross, J., in the case of *Thompson's Estate* (1), that these words "mean that the Court should have regard to the equities not merely of the owners of superior interests, but also to those of persons interested in the estate." Mr. Jellett, relying upon some expressions of Longfield, J., in *Comyn's Estate* (2), contends that we should only have regard to the head landlord's interest. That is quite contrary to the principles upon which apportionment and redemption orders have been made under the Land Purchase Acts. The interests of all parties have been and ought to be considered.

Now, in the present case, if a larger proportion of the superior fee-farm rent were to be apportioned in respect of the lands charged with the sub-rent of £12 18*s.* than that amount, very great confusion and difficulty would be created. The rights of the parties could only be adjusted by cumbrous and expensive procedure under other sections of the Acts. Inasmuch as all the costs of this apportionment and redemption, and of such orders as may be necessary to adjust the rights between the owners of Gaurus and of the other townlands charged with the superior landlord's rent would fall on the vendors in this case, I think it would be, in a high degree, inequitable to them to apportion the superior fee-farm rent in any other way than that in which Wylie, J., has done it. After all, the head landlord gets very well out of this transaction. The lands of Gaurus have been sold to the tenants for £878, which, we are told, amounts to only eighteen years' purchase of the rents previously payable by them. The fee-farm rent of £12 18*s.* has been redeemed for £335 8*s.*, *i.e.*, for about twenty-six years' purchase; and the head landlord, under the order appealed from, takes the whole of this sum. If his application were granted to have a larger proportion of his fee-farm rent charged upon the portion of the lands sold, he clearly would not be entitled to have it redeemed at so high a rate, for, on his own showing, his fee-farm rent is not so well secured as the sub-fee-

(1) [1901] 1 I. R. at p. 393. (2) 11 Ir. Ch. R. 330.

farm rent of £12 18*s.* In addition to getting this high price for the portion of his head-rent which is redeemed, he is entitled to all his costs of apportionment and redemption, which must be paid, along with their own, by the unfortunate vendors out of the small balance of £543, which remains of the tenants' purchase-money. The balance of his fee-farm rent is also amply secured by land, the annual value of which is, according to the evidence of the valuer, twice the amount of the portion of the fee-farm rent remaining charged upon it.

I think that Wylie, J., has carried out the apportionment and redemption in a manner that is manifestly "equitable," and that his order should be affirmed.

Solicitors for the appellant: *Milward Jones & Cameron.*
Solicitor for the vendors: *R. A. MacNamara.*
Solicitor for Catherine Clune and her co-owners: *M. J. MacNamara.*

R. ST. J. C.

Ross, J.
1912.
Feb. 14, 19.

IN THE MATTER OF THE ESTATE OF ALICE THOMSON, OWNER AND PETITIONER.

Mortgage—Consolidation—Right to consolidate not exercised.

The right of a mortgagee to unite two securities from the same mortgagor is an equity exercisable at the option of the mortgagee.

By deed dated 1872, A mortgaged certain lands to B to secure £32,000. By deed dated October, 1872, A mortgaged the same lands to B to secure a further sum of £5000. The deed contained a proviso for redemption on payment of the said sums of £32,000 and £5000. By a third deed dated July, 1874, A mortgaged the same and other lands to B to secure a further sum of £6000 The last-mentioned deed contained a proviso that notwithstanding anything therein contained, B should not be compelled to reconvey the lands or any part thereof until the aforesaid sums of £32,000 and £5000, as well as the said sum of £6000, should be fully paid and satisfied. The lands, the subject of the mortgages of 1872, were afterwards sold to the tenants in the Land Commission Court, and the other lands, the subject of the mortgage of 1874, were about the same time sold in the Land Judge's Court on the petition of A as owner. In the events that happened it became in the interest of A that B should consolidate, which B declined to do.

Held, that the proviso in the deed of 1874 did not amount to an exercise by the mortgagee of his right to consolidate.

OBJECTION to the final schedule of incumbrances.

The objection of the Representative Church Body of the Church of Ireland stated that the objectors were the persons named as claimants at items Nos. 6, 7, 8 on the final schedule of incumbrances. The incumbrance set out at No. 6 was created by deed, dated 15th April, 1872, made between William Thomson, first part, Henry Corbet Singleton, second part, Henry Thomson, third part, Edward William Thomson, fourth part, Anne Thomson, fifth part, Alice Thomson, sixth part, Thomas Greene, seventh part, and the objectors, eighth part, whereby certain lands situate in the county of Down other than the lands sold in this matter were conveyed by way of mortgage to secure the repayment to the objectors of the sum of £32,000 with interest.

The incumbrance set out at item No. 7 was created by a further mortgage, dated the 31st October, 1872, made between William Thomson, first part, Anne Thomson, second part, Alice Thomson, third part, Thomas Greene, fourth part, and the objectors of the fifth part, whereby the said lands in the county of Down, other than those sold in this matter, were conveyed by way of mortgage to secure the repayment to the objectors of the sum of £5000 with interest. The deed contained a proviso for redemption on payment of the said sums of £32,000 and £5000.

The incumbrance set out at item No. 8 was created by a further mortgage, dated 9th July, 1874, made between William Thomson, first part, Anne Thomson, second part, Alice Thomson, third part, Thomas Greene, fourth part, and the objectors, fifth part, whereby the lands sold in the present matter, together with the lands comprised in the deeds of April, 1872, and October, 1872, were conveyed by way of mortgage to secure the repayment to the objectors of the sum of £6000 with interest.

The deed of the 9th July, 1874, recited the two earlier mortgage deeds, and contained a proviso for redemption on payment of the said sums of £6000 and £32,000 and £5000, also a proviso "that notwithstanding anything in these presents contained, the said Representative Church Body, its successors or assigns, shall not be compelled to reconvey the said lands and premises hereinbefore firstly, secondly, and thirdly granted, or any part thereof unto the said William Thomson or unto any other person or persons legally or beneficially interested in the said lands, hereditaments and premises, or any part thereof, unless and until the aforesaid sums of £32,000 and £5000 so secured as aforesaid by the said recited mortgages of the 15th day of April, 1872, and 31st day of October, 1872, respectively, as well as the said sum of £6000 intended to be hereby secured, and all interest thereon, respectively, and all costs, charges, and expenses payable in respect thereof, shall be fully paid and satisfied."

The said deed of the 9th July, 1874, also contained a proviso that if the mortgagor should on every 4th April and 4th October up to the 4th April, 1887, pay to the Representative Church Body interest on said sum of £6000, and should perform the

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covenants therein contained, then the Representative Church Body would not before the 4th April, 1887, call in the said principal sum of £6000; and the said mortgage also provided that the mortgagor should not before the 4th April, 1887, compel the Representative Church Body to receive the sum of £6000 unless the mortgagor had previously sold the said lands and hereditaments, in which case, but not otherwise, it should be lawful for the mortgagor at any time after the expiration of seven years from the 4th April, 1874, to pay off the said loan upon first giving six months' notice of his intention so to do. Certain annuitants joined in the deed of 1874 to postpone their annuities to the £6000.

The principal sum and interest thereon due on foot of the said mortgage of the 15th April, 1872, was paid to the objectors on the 23rd December, 1911, out of the proceeds of the sale of the lands comprised in the said mortgage, which lands were sold in the Land Commission, in *The matter of the Estate of Alice Thomson, Co. Down* (E. C. 3110). In the said Land Commission matter payments were also made in respect of the sums due on foot of the said mortgage dated 31st October, 1872, and there was now due on foot of the said mortgage the sum of £4624 10*s.* 1*d.* for the principal and interest. There was now due on foot of the mortgage dated the 9th July, 1874, the sum of £6000 for principal and £702 for interest.

The lands sold in the Land Commission matter were totally insolvent as regards capital; but, on the allocation, it was contended that the entire lands included in the mortgage dated the 9th July, 1874, were also security for the mortgages of the 15th April, 1872, and the 31st October, 1872, that is to say, that the mortgage of the 9th July, 1874, consolidated all the charges. If this were so, the whole estate would be solvent as regards income at the date of the sale, and the "bonus" payable in respect of the lands sold in the Land Commission matter would be payable to the vendor. But if not, the "bonus," which amounted to over £4000, would be added to the purchase-money, and allocated in reduction of the amount due in respect of the first two mortgages.

On the foregoing facts the objectors objected to the incumbrances set out at items Nos. 6 and 7 on the final schedule of incumbrances in the present matter being declared well charged on the lands sold in the present matter, or to the objectors being entered as claimants on the final schedule, except upon the terms of the whole of the moneys now due to the objectors for principal and interest in respect of said mortgages of the 15th April, 1872, 31st October, 1872, and 9th July, 1874, being repaid to them.

Jellett, K.C., and *Darley*, for the objectors, the Representative Church Body.

G. W. Walker, K.C. (with him *Brunskill*), for the owner:—

Prior to the passing of the Conveyancing Act, 1881, sect. 17, the right of the mortgagee was to consolidate. "When the mortgage-debts became united in the same creditor, both estates became pledged for the whole amount": *per* Page Wood, V.-C., in *Selby* v. *Pomfret* (1). The purchaser of the equity of redemption, in order to redeem, must pay off both mortgages "each of which affects the entirety of both estates": *per* Stuart, V.-C., in *Vint* v. *Padgett* (2); *Pledge* v. *White* (3). The proviso in the deed of the 9th July, 1874, was simply exercising beforehand the right of consolidation, and made the charges become charged on all the property at once. In the mortgage of 1874 the two earlier mortgages were fully recited, and by the proviso in question, it was intended to charge all the lands in a precise and artistic way. The mortgagees at that date had the power of consolidation. The reason the mortgagees are not to be compelled to reconvey is because the charges are thrown on all the lands. The deed of 1874 is a deed of consolidation, and of further charge and further security. The sale of the whole estate was contemplated.

Brunskill:—

Once the mortgagees said "you must pay off both mortgages" then both mortgages affected the entire of the estates. The deed

(1) 1 J. & H. 336; 3 D. G. F. & Jo. 595.
(2) 1 Giff. 446; 2 D. & J. 611.
(3) [1896] A. C. 187.

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of 1874 was an exercise by the Representative Church Body of their right as mortgagees to consolidate. They were not satisfied with the mere right of consolidation, they exercised that right in anticipation. They elected and cannot now go back on it. (Coote on Mortgages, p. 873).

Jellett, K.C., in reply :—

A mortgagee has a right to consolidate, a right which he may or may not assert at his pleasure. In *Pledge* v. *White* (1) the mortgagee was asserting his right. It is now argued that the right to consolidate amounts to an actual charge. In the cases cited, the question did not arise whether the right to consolidate amounts to an actual charge. *Selby* v. *Pomfret* (2) was explained and dissented from in *Cummins* v. *Fletcher* (3). We have not claimed or asserted the right to consolidate. The reason the proviso was put in the deed of 1874 was to put the right to consolidate beyond all doubt. The House of Lords had never up till then dealt with the question, and Judges had shown their dislike to the principle. On a search in this country against the lands secondly and thirdly conveyed by the deed of 1874, the two mortgages for £32,000 and £5000 would not have turned up at all, as the memorial would not set out this proviso. The three annuitants who joined in the third deed postponed their annuities to the £6000. If the argument on the other side is right, they were *ipso facto* postponed to the £32,000 and £5000.

[*Brunskill* cited *Jennings* v. *Jordan* (4).]

Feb. 19

Ross, J. :—

This is an objection of the Church Representative Body to remove two mortgages of their own from this schedule. The object of the motion is to affect the bonus payable under the Act of 1903 in respect of an estate of the owner sold in the Land Commission.

The owner's predecessor was entitled to two properties, one, an agricultural estate, which has been sold in the Land Commission

(1) [1896] A. C. 187.
(2) 1 J. & H. 336.
(3) 14 Ch. D. 699.
(4) 6 A. C. 698.

Court; the other, an urban property in the town of Newry, which has been sold in this Court. On the 15th April, 1872, he mortgaged the first-mentioned agricultural estate to the objectors, the Church Body, for £32,000. On the 31st October, 1872, he mortgaged the same property to the objectors for £5000. The deed contained a proviso for redemption on payment of the said sums of £32,000 and £5000. On the 9th July, 1874, he mortgaged both estates to the objectors for £6000.

This deed contained a proviso that, notwithstanding anything therein contained, the objectors should not be compelled to reconvey the lands or any part thereof, until the aforesaid sums of £32,000 and £5000, secured by the said mortgages respectively, as well as the said sum of £6000, should be fully paid and satisfied.

Now, this is a purely personal covenant. It in no way affects the areas of charge. It is unilateral. It gives the lender an option, which he may or may not exercise. I do not consider that the other clauses relied on throw any certain light on the matter. The contention of the owner, in short, is that the effect of this clause is to charge the town premises with the first two mortgages, although these mortgages were only charged on the agricultural estate.

The owner's contention is based upon the equitable rule as to the consolidation of mortgages. It is not a doctrine that has met with general approbation. It was held, however, by the House of Lords (1) that it was too long in operation to be overthrown. By the 17th section of the Conveyancing Act of 1881 the doctrine is not to be applied in cases where the conveyances are executed after the Act comes into operation. All these conveyances, however, are before the Act.

The rule is, shortly, this, that where the owner of different properties mortgages them to different persons, and the mortgages afterwards become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on all. The expressions used by the Judges in laying down this rule have been

(1) *Pledge* v. *White*, [1896] A. C. 187.

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misunderstood and misapplied. In *Selby* v. *Pomfret* (1), Page Wood, V.-C., says:—"The mortgagor pledges two estates, although to different persons and for different debts; and the law is, that, when those debts became united in the same creditor, both estates became pledged for the whole amount." Again, in *Vint* v. *Padgett* (2), Stuart, V.-C., says that, when the union has taken place, "there is only one single debt; and, in order to redeem, he must pay off both mortgages, each of which affects the entirety of both estates."

Now, as applied to the particular cases before the learned Judges, the language is adequate. It means that, under the circumstances, the results were just the same as if both estates had been pledged. It was never intended to mean that, under any circumstances, each of the mortgages affects the entirety of both estates. That is not the law.

The whole doctrine of consolidation originated by reason of the interference of Courts of Equity in cases of redemption. The Court granted its aid, but only on terms that were just and equitable. It was considered just and equitable that the mortgagor must pay all that was due before he obtained the relief he sought. It is an equity in the mortgagee or his assign, which he may or may not enforce. To contend that the mere union of the charges has the effect of creating a direct charge on the entirety of both properties, is a proposition without any authority whatever.

In a country where a registry of deeds obtains, no extension of this doctrine can be permitted. In this case the proviso might not appear in the memorial, and a purchaser might buy the town property under the belief that it was subject merely to the £6000, only to find later that it was subject to the two mortgages of 1872, which would not appear in the registry.

I am, therefore, of opinion that these two mortgages do not affect the property sold in this Court by way of charge, and I must, therefore, allow the objection, and remove them from the schedule.

Solicitors for the objectors, the Representative Church Body: *Maunsell, Darley, & Orpen.*

Solicitor for the owner: *T. T. L. Overend.*

D. M. S.

(1) J. & H. 336. (2) 1 Giff. 446.

IN THE MATTER OF THE ESTATE OF TERESA BURKE.

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1912.
Feb. 27.
March 5.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 79—*Purchase by the Congested Districts Board—Vesting order under s.* 16—*Right of mining and taking minerals—s.* 13 (3)—*Reservation of, on resale.*

When the Congested Districts Board buy land under s. 79 of the Irish Land Act of 1903, the fee-simple is to be vested in the Board in the same manner and to the same extent as it is vested in the Land Commission by a vesting order made under s. 16, and the provisions of s. 13 (3), relating to the reservation to the Land Commission of the exclusive right of mining and taking minerals, do not apply to a vesting order made either under s. 16 or s. 79.

On the resale by the Board of the land so purchased, if the Board elect to sell under the Act of 1903, the mineral rights must be reserved to the Land Commission, but, if otherwise, the mineral rights need not be so reserved, unless it is provided that they should be so reserved in the agreement between the Board and the purchasing tenant.

QUESTIONS OF LAW submitted for the decision of the Judicial Commissioner pursuant to section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—

On the 17th February, 1911, the vendor entered into a preliminary agreement with the Congested Districts Board whereby she agreed to sell and the Board agreed to purchase, in accordance with the provisions of the Land Purchase Acts and the Congested Districts Board Acts, the fee-simple of the lands therein referred to, and it was further agreed that the lands should be vested in the Board discharged from all claims affecting the lands whether in respect of superior or intervening interests, or incumbrances, or otherwise, but subject to any public rights affecting the lands, to any maintenance charge under the Public Works Acts, to the interests of the tenants in occupation of the lands, or of any person having claims upon those interests, to any easements, rights, and appurtenances mentioned in section 34 of the

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Land Law (Ir.) Act, 1896, and the other terms of the agreement now in statement, for the sum of £9000 guaranteed 3 per cent. stock, to be provided and paid in accordance with the Land Purchase and Congested Districts Board Acts.

The agreement also contained the following provision, Clause 9 :—"All sporting rights, and water rights, and rights to water power, if any, on or over or belonging to the said lands mentioned in the schedule hereto, which are now vested in the vendor, or which the vendor has power to sell or dispose of, and all other rights, easements, appurtenances, and privileges appertaining to the estate, or usually enjoyed therewith, shall be transferred to and vested in the Board."

The lands comprised in the said estate had been, by the Board, duly declared fit to be regarded as "separate estate."

Subsequently the vendor lodged the originating request in this matter, in which the lands were described as held by the vendor in fee-simple. It was also stated therein that there were no sporting, mineral, or water rights, or any superior interests other than the quit-rent, tithe rentcharges, Board of Works charges, and jointure, therein referred to.

Subsequently a certificate of counsel was lodged, pursuant to rules, in which counsel certified that, in his opinion, the tenure under which the lands were held, and the particulars of the superior interests and of the persons interested in the lands, were, so far as appeared from the documents referred to in the originating request, correctly stated.

On the 31st October, 1911, the Estates Commissioners certified the vendor to be a person who might be dealt with as the owner of the lands in accordance with the provisions of Part One of the Irish Land Act, 1903.

On the same date, a final agreement prepared by the Estates Commissioners, pursuant to section 79 of the Irish Land Act, 1903, was entered into between the vendor and the Board confirming the said preliminary agreement.

The usual notices directed by the rules had been published, and no objection to the vesting of the lands in the Board had been made.

The Estates Commissioners were prepared, pursuant to section 79

of the Irish Land Act, 1903, to make an order vesting the lands in the Board, but before doing so the Estates Commissioners and the Congested Districts Board desired to obtain the decision of the Judicial Commissioner on the following questions of law:—

1. Do the provisions of section 13 (3) of the Irish Land Act, 1903, apply to the case of sales of estates to the Congested Districts Board pursuant to the provisions of section 79 of the said Act?

2. Should the mineral rights in the present case be expressly reserved to the Irish Land Commission by the vesting order about to be prepared?

3. Assuming that questions 1 and 2 are answered in the negative, must the mineral rights be reserved to the Land Commission on the re-sale of the lands purchased by the Congested Districts Board to purchasers under the Land Purchase Acts?

W. M. Jellett, K.C., and *De Renzy, K.C.*, for the Land Commission:—

This is a sale under the Land Purchase Acts. The opening words of section 13 (3) of the Act of 1903 provide that "on the sale under the Land Purchase Acts of any land . . . comprised in an estate by the owner of the estate, there shall be reserved . . . to the Land Commission" the exclusive mining rights. The subject-matter on which the sub-section operates is *land*. The word "estate" there is not used in its technical sense, as is also the case in other sections of the Act, *i.e.*, section 3 (2): see *In re Finlay's Estate* (1), and section 60, where the term is used in its extended meaning. The provisions in Part One of the Act of 1903, under which the Estates Commissioners derive their jurisdiction as regards matters leading up to the sale, are followed subsequently by provisions giving a corresponding jurisdiction to the Congested Districts Board. Compare section 2 with section 75, as extended by section 53 of the Act of 1909, section 3 with section 76, section 21 with section 78, sections 4 and 20 with section 18 (4) of the Act of 1909, section 19 with section 54 of the Act of 1909, section 18 with section 56 of the Act of 1909.

(1) 38 I. L. T. R. 101.

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In contradistinction to these are the provisions dealing with the rights, liabilities, and powers of the purchaser once he has bought. This latter class of provisions is comprehensive and occurs once and for all: See sections 14 and 15. Section 55 of the Act of 1909 shows that the provisions of section 15 apply to the Congested Districts Board. So also, the vesting in the Congested Districts Board, in sales under section 79, is carried out by reference to sections 16 and 24. The effect of a vesting order under section 16 is to vest the fee-simple in the land purchased, subject, *inter alia*, "to the provisions of this Act with respect to minerals," which include the provisions of section 13 (3). That sub-section, accordingly, must be brought in under the latter class of provisions. This is emphasized by section 60 (2) of the Act of 1909, providing that, on the failure of negotiations for the purchase of an estate situated in a congested districts county, the particulars to be inserted in the final offer by the Congested Districts Board are to be the same as those inserted in the final offer by the Estates Commissioners under section 43 (2) of the same Act. The final offer is there expressly declared to be "subject to the provisions of the Act of 1903 with respect to minerals," *i.e.*, the provisions of sections 13 (3) and 99.

Further, if the minerals go to the Congested Districts Board, the Board will have no power to dispose of them: *In re Bandon's Estate* (1); and the vendor will be deprived of her right to the percentage mentioned in section 13 (3), which she would be entitled to if the Land Commission were in a position to lease or sell the mining rights.

As to the position on resale under section 2 of the Congested Districts Board Act, 1893, the Board become landlords of land purchased. If it should be held that section 13 (3) does not apply on the sale to the Board, the Board would be in the same position as any other landlord on the re-sale, and would be bound by the provisions of section 31 (2) of the Act of 1896. [Counsel also referred to *In re Erne's Estate* (2).]

(1) 40 I. L. T. R. 192. (2) [1912] 1 Ir. R. 77.

The Solicitor-General (*Ignatius O'Brien, K.C.*), and *Edmund Coll*, for the Congested Districts Board :—

The purposes of the Congested Districts Board are very wide. Under section 39 (1) of the Act of 1891, the Board may take such steps as they think proper for (*c*) aiding and developing, *inter alia*, fishing (including the construction of piers and harbours . . .) and any other suitable industries. The possession of minerals would be a most useful means to this end.

The powers of the Board to acquire land are derived from the Congested Districts Board Act, 1893. "Land" includes minerals. By section 2 of the Congested Districts Board Act, 1899, the Board were given power to purchase up all superior interests as defined by section 31 of the Act of 1896, which included any mineral rights that might be reserved. In either case, mines and minerals became vested in the trustees of the Board, as part of the fee-simple of the land. Section 79 of the Act of 1903 merely prescribes the manner in which sales to the Board are to be carried out and does not confer any new powers on the Board: *In re Longfield's Estate* (1). If the land passes to the Board under powers acquired prior to the Act of 1903, how can it be contended that the provisions of s. 13 (3) apply? Where the Board buy an estate, the fee-simple is vested in the Board in the same manner as it is vested in the Land Commission by a vesting order under section 16 of the Act of 1903, which includes all minerals that do not come within section 99.

The resale is carried out under the Act of 1896, and assuming that the mines and minerals become vested in the Board, they would be dealt with on the resale, under the provisions of s. 31 (2) of that Act.

A. C. Meredith, K.C., for the vendor, supported the contention of the Land Commission, that the provisions of section 13 (3) applied to purchases by the Congested Districts Board. Under section 79 (1) of the Act of 1903 the Board are empowered to enter into agreements for the purchase of land from any

(1) 41 I. L. T. R. 124.

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person who may be certified by the Estates Commissioners to be a person who may be dealt with as the owner of the land in accordance with the provisions of Part One of the Act, *i.e.* the provisions of section 17. The opening words of that section are, "Where any person proposing to sell land under the foregoing provisions of this Act gives *prima facie* evidence," &c. One of the foregoing provisions is section 13 (3).

H. MacDermot, appeared for the Treasury.

De Renzy, K.C., replied.

March 5.

WYLIE, J. :—

In this case the Estates Commissioners have submitted to me three questions with reference to mining and mineral rights in the case of estates purchased by the Congested Districts Board under the Land Purchase Acts.

Having regard to the largely increased powers and operations of the Board, and the immense area over which, by the Act of 1909, the Board has been given almost exclusive control, the question of the mineral rights in relation to estates purchased by the Board has become of vast importance. In such cases it has been the practice of the Estates Commissioners, since the Act of 1903, when vesting estates in the Congested Districts Board, or their trustees, under section 79 of the Act of 1903, to reserve the mining and mineral rights to the Land Commission, as in other cases under the provisions of section 13 of said Act. The Congested Districts Board now challenge that practice, and claim that the mining and mineral rights belong to them, where they are included in the estate purchased, and that the Land Commission have no right or power to deal with them.

The facts of this case are clearly and concisely stated in the memorandum submitted, with the questions, by the Estates Commissioners; and it appears clearly from the facts there stated and the agreement for purchase therein referred to—indeed it is the common case—that all mining, mineral, and sporting rights were included in the fee-simple purchased by the Board. That being so, and the Estates Commissioners being now required to make a vesting order in compliance with the provisions of sect. 79 of the Act of 1903, vesting the purchased land in the Congested

Districts Board, the question is raised, whether in making the vesting order the Estates Commissioners are, in accordance with their practice hitherto, to reserve the mining and mineral rights to the Land Commission, or vest the entire fee-simple in the Congested Districts Board, without exception or reservation.

I had occasion some time ago, in *In re the Congested Districts Board's Estate* (1), to consider the position of the Congested Districts Board in relation to the purchase and resale of land under the Land Purchase Acts, and to discuss at some length the provisions of these Acts and of the Congested Districts Board Acts relating thereto, but the points decided in that case had nothing to do with the questions now raised, and, even at the risk of repeating myself to some extent, I must, before considering the provisions of the Act of 1903, refer to the previous Acts dealing with this matter.

Now, prior to the Congested Districts Board Act, 1893, the Board had no power to acquire land. It was acquired and held by the Land Commission on behalf of the Board, but by section 2 of the Act of 1893 the Board were empowered to acquire land and were to be *landlords* of all land so acquired, within the meaning of the Land Purchase Acts, and the land so acquired was to be vested in trustees for the Board. The word "land" of course includes mines and minerals.

Prior to 1896, the Board paid for the lands acquired by them out of their own moneys, but by section 43 of the Act of 1896, where the Board had agreed to purchase land, the Land Commission, on the request of the Board, were bound, subject to certain restrictions, to advance the purchase-money to the Board, and the advance was to be repaid by the Board by an annuity similar to that payable by a tenant purchasing his holding. The annuity was not charged on the land, but was deducted by the Land Commission from the interest on the Church Surplus Grant, which was the property of the Board.

Then by section 2 of the Congested Districts Board Act, 1899, the Board were empowered to purchase up, and the Land Commission were empowered to redeem, all superior interests as defined by section 31 of the Act of 1896, by means of an

(1) [1910] 1 I. R. 55.

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advance by the Land Commission, which was to be repaid by the Board, in the same manner as the advance for the purchase of the estate.

By section 3 of the same Act, the Land Commission were not to make an advance to the Board unless the ownership of the land purchased was registered under the Local Registration of Title Act, and, where registered after the date of agreement for sale to the Board, no fee was to be paid on the transfer to the trustees of the Board.

These were the provisions, shortly stated, regulating the position of the Board as purchasers of land, under the Land Purchase Acts, up to the Act of 1903. It is plain, therefore, that prior to 1903, the Land Commission had nothing to do with the vesting in the trustees of the Board of any land purchased by the Board under the Land Purchase Acts, and I think it is equally plain, from the provisions I have referred to, that the absolute fee-simple of the lands was vested in the trustees of the Board, either by direct conveyance from the vendor of the estate, if he had it, or by the redemption of all superior interests under section 2 of the Act of 1899. It seems to me, therefore, that prior to the Act of 1903, where the Congested Districts Board purchased the mining and mineral rights, they were vested in the trustees of the Board as part of the fee-simple of the land.

Now, let us see whether the law in this respect is altered or affected by the provisions of the Act of 1903. When the Land Commission buy land under this Act, the precise effect of the vesting order is set forth in section 16. It is effectual to vest in the Commission the fee-simple of the land purchased, subject (*a*) to any public rights, (*b*) to any sporting rights reserved by the vendor, (*c*) to any maintenance charge, (*d*) to any interests of the tenants on the land, and to any easements, &c., mentioned in section 34 of the Act of 1896, but save as aforesaid and to the reservation of sporting, mineral, and water rights within sect. 99, freed and discharged from all claims upon the land. If, therefore, the mining and mineral rights were in the possession and enjoyment of the vendor at the time of sale, and were not then being worked by him, they would vest in the Land Commission by virtue of the vesting order.

The purchase of land by the Board is regulated by section 79, which provides that the Board may enter into agreements for the purchase of land from any person who may be certified by the Estates Commissioners to be a person who may be dealt with as the owner of the land; and the Commissioners shall, in the prescribed manner, prepare such agreements, and make orders vesting the land in the trustees of the Board; and, where such an order is made, the purchase-money is to be distributed as if it were purchase-money of land vested in the Commission. Then Rule 8 of the Regulations provides that any resolution of the Board with reference to the purchase shall state the price which the Board have provisionally agreed to pay for the estate, provided the lands are vested in the Board in fee-simple, discharged of superior and other interests, save as provided in the Act; and by Rules 9 and 10, the Rules applicable to the certifying of title and vesting, in the case of a purchase by the Land Commission, are made applicable in the case of a purchase by the Board. The last clause of the originating request, in case of a sale to the Congested Districts Board, is a proposal to sell the estate to the Board in fee-simple, discharged from all claims as specified in section 16, but subject as therein mentioned.

So it appears to me to be clear that where the Congested Districts Board buy an estate under the Act of 1903, the fee-simple is to be vested in the Board in the same manner and to the same extent as it is vested in the Land Commission by a vesting order under section 16, unless there is something else in the Act to prevent this.

Now, the only section that I have been referred to which it is supposed has this effect is section 13 (3). That sub-section provides that, on the sale under the Land Purchase Acts of any land by the Land Commission, or of any land comprised in an estate by the owner of the estate, there shall be reserved to the Land Commission the exclusive right of mining and taking minerals, and digging and searching for minerals on or under that land, and the said right shall be disposed of by the Commission in manner to be thereafter provided by Parliament, provided that the section is not to apply (*a*) to any demesne or other land resold under section 3; (*b*) to any such right which constitutes a superior

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interest, or (*c*) to any stone, gravel, sand, or clay. Now, that sub-section only applies to two classes of cases—(1) sales by the Land Commission, *i.e.*, sales by the Land Commission to tenant-purchasers, or persons deemed to be tenant-purchasers of parcels; and (2) sales by the owner of an estate (*i.e.*, of land declared by the Estates Commissioners under section 99 to be "an estate") of part of the land comprised in the estate; in other words, sales by the owner of such an "estate" to the tenant-purchasers on the estate. The sub-section, in my opinion, has nothing whatever to do with a vesting order under section 16 or under section 79, and applies only in case of sales to occupiers.

Therefore, the first two questions, which are in substance the same, though different in form, viz.: "Do the provisions of section 13 (3) of the Irish Land Act, 1903, apply to the case of sales of estates to the Congested Districts Board pursuant to the provisions of section 79 of the said Act?" and "should the mineral rights in the present case be expressly reserved to the Irish Land Commission by the vesting order about to be prepared?" I answer in the negative.

The third question is—"Must the mineral rights be reserved to the Land Commission on the resale of the lands purchased by the Congested Districts Board to purchasers under the Land Purchase Acts?"

As I pointed out in *In re The Congested Districts Board's Estate* (1), the Congested Districts Board are to be *landlords* of all land acquired by them within the meaning of the Land Purchase Acts, and they have the same power to sell to their tenants by means of advances under the Land Purchase Acts as any other landlord. This is shown by Congested Districts Board Act, 1894, section 1; section 43 (4) of the Act of 1896; Congested Districts Board Act, 1899, section 1; and section 80 of the Act of 1903; and they could also sell "parcels" under section 75 of the Act of 1903, now repealed, but re-enacted in amended form by section 53 of the Act of 1909. But it was assumed by all parties throughout the argument that the Congested Districts

(1) [1910] 1 I. R. 55.

Board could only re-sell to their tenants under the Act of 1896 ; and if that were so, the question of the reservation of mineral rights would have to be dealt with under section 31 (2) of that Act, and it seems to me that the Congested Districts Board would have the same rights as any other landlord under that section, with the approval of the Land Commission, either of passing the mineral rights to the purchasing tenant, or of reserving them to the Board, or to the Land Commission, if so provided in the agreement for sale.

It appears to me, however, on looking further into the Acts, that the Congested Districts Board can, if they choose, like any other landlord, sell their estates under the Act of 1903, though some points of difference are specially provided by the Acts. For example, section 1 (5) provides that that section shall not apply in the case of holdings on estates purchased by the Congested Districts Board, and this exclusion is explained by reference to section 80 of the Act, which enacts that where an application is made to the Land Commission for an advance under the Land Purchase Acts to a person purchasing any land from the Board, and the Board certify that the land is, in their opinion, sufficient security for the repayment of the advance, the Land Commission shall sanction the advance ; and by section 81, where an advance is sanctioned in pursuance of such certificate, the Board are liable to pay any arrears of the purchase annuity that are declared irrecoverable. Again, section 2 of the Act of 1904 enacts that the percentage mentioned in section 48 of the Act of 1903 may be paid to any vendor *other than the Congested Districts Board*. I cannot see any meaning in these exceptions unless the Congested Districts Board can be vendors, under the Act of 1903, of land which the Estates Commissioners may declare to be an "estate" under section 98. If this be so, and if the Board choose to sell under the Act, and the Estates Commissioners declare the "estate," then, of course, section 13 (3) would apply, and the orders or fiats vesting the holdings in the tenants and others would reserve the mineral rights to the Land Commission in the case of sales by the Congested Districts Board, as in the case of sales by any other owner of an "estate." But there is nothing that I can find, either in the Act of 1903 or in the Act of 1909, to deprive the Board

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of the option that admittedly belongs to other landlords of selling under whichever Act they choose.

Therefore, I answer the third question, "Yes, if the Congested Districts Board elect to sell under the Act of 1903; but, if otherwise, no, unless it is so provided in the agreement between the Congested Districts Board and the purchasing tenant."

Solicitor for the Land Commission: *W. Alexander.*
Solicitor for the Congested Districts Board: *J. O'Conor.*
Solicitors for the vendor: *O'Hagan & Sons.*
Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

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IN RE PATRICK LEONARD'S ESTATE.

Land Commission—Jurisdiction—Rectification of fiated and registered purchase agreement—Injury to third party—Easement—Appeal—Local Registration of Title Act, 1891, *section* 34, *sub-sections* (1) *and* (2)—*Land Law* (*Ireland*) *Act*, 1896, *section* 32, *sub-section* (3), *section* 50, *sub-section* (4)—*Purchase of Land* (*Ireland*) *Act*, 1885, *section* 22.

An appeal to the Court of Appeal lies under section 22 of the Purchase of Land (Ireland) Act, 1885, upon any question of law from an order of the Land Commission made under section 32, sub-section (3), of the Land Law (Ireland) Act, 1896.

Where a purchase-agreement, duly fiated and registered, reserved a right of way over the land comprised therein in favour of a purchaser from the Land Commission of an adjacent holding.

Held, reversing the decision of Wylie, J., that there was no jurisdiction in the Land Commission to make an order under section 32, sub-section (3), of the Land Law (Ireland) Act, 1896, to amend the agreement and rectify the register by omitting the reservation, inasmuch as same could not be done without injury to the person in whose favour the right of way was reserved, within the meaning of section 34, sub-section (2), of the Local Registration of Title (Ireland) Act, 1891.

MOTION by Irwin Thomas Chambers and John George Chambers that their purchase-agreement, dated the 9th November, 1909, and the fiat thereon, be amended by striking out clause 9 in the agreement. The Estates Commissioners had purchased certain

untenanted lands in the county of Dublin, called Grange, from one Patrick Leonard, and after certain negotiations carried on by their inspectors, sold one portion thereof to John Beatty and another portion, being that comprised in the purchase-agreement in question, to Irwin Thomas Chambers and John George Chambers. The 9th clause of the agreement was as follows:—"The purchaser hereby agrees that the said parcel of land is subject to, and may be vested in him subject to, a right of way for the owners and occupiers for the time being of holdings in the townland of Grange, and their heirs and assigns, on foot and with horses and carts, between the points E. and F. as shown on the estate map produced to him by the inspector of the Irish Land Commission, as pointed out to him on the lands by the said inspector." This document was signed by the purchasers. Their case now was, that it had not been explained to them, and that they did not understand that such right of way was to be reserved, and that its reservation in clause 9 of the agreement was a mistake. They made a joint affidavit in support of the motion in which they stated that during the preliminary negotiations nothing was said by the inspector about the right of way, that the agreement was not read to them, and that they signed it without reading it, and in ignorance of the reservation of the right of way.

To oppose the motion John Beatty made an affidavit stating that Mr. McCoun, inspector of the Land Commission, informed him before the sale that his farm would have to be worked in connexion with the county road through the adjoining portion of the estate which was being sold to the Chamberses. He was given possession on the 30th March, 1909, when Mr. McCoun pointed out to him the way which he was to have over the adjoining lands. Mr. McCoun made an affidavit in which he stated that he was present when the Chamberses signed the agreement, undertaking to purchase, which was read out to them, their attention being particularly called to the intended reservation of the right of way. The assistant of Mr. Dickie, solicitor for the Chamberses, who was present at the signing of the agreement, denied that it was read to them, and did not recollect any mention of a right of way. Mr. R. W. Pinkerton, the inspector in special charge of the purchase and re-sale of the estate, said that during the

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negotiations with the Chamberses no mention was made to them about reserving a right of way over the land they were about to purchase. In a further affidavit Mr. McCoun said the only right of way he intended to give Beatty was one on foot.

Beatty brought an action in the Chancery Division for an injunction to restrain the Chamberses from obstructing the right of way over their lands which he claimed as a right of way on foot, and with horses and carts. On the 14th February, 1911, the Master of the Rolls stayed further proceedings in the action, the defendants undertaking to make the present application, and in the meantime to desist from any obstruction.

Matheson, K.C., M'Cann, K.C., and *Alfred Dickie,* for Irwin Thomas Chambers and John George Chambers.

Cecil Forde, for Mr. Beatty.

WYLIE, J.:—

The application in this case is one, in effect, to strike out clause 9 in the fiated agreement to purchase by Irwin Thomas Chambers and John George Chambers. The clause in question is a printed form contained in all such agreements, with blanks left to be filled up or not, as circumstances might require, and in this case are filled up, and purports to reserve a right of way on foot and with horses and carts to the owners and occupiers for the time being of the holdings on the townland of Grange, over the Chamberses' holding, and marked from points E to F on the maps attached to the fiat.

I have been particularly impressed by the evidence produced to me of Mr. Pinkerton, the Land Commission inspector, who arranged the terms of purchase with the Chamberses. I have no doubt that the Chamberses afterwards came to the Land Commission to sign an agreement to carry out the terms of purchase so arranged. Mr. McCoun, another Land Commission Inspector, and Mr. Pinkerton were present. After a full consideration of all the evidence in the case I am satisfied that neither the Chamberses nor their solicitor's assistant, Mr. Hayes, who was present, either knew or understood at the time of the signing of the agreement that any right of way was being thereby reserved to anyone. It

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does appear no doubt from the last affidavit of Mr. McCoun that he promised a right of way on foot only to Beatty over the lands. Whether that had the effect of conferring a right of way on foot on Beatty I am not called upon, nor have I the materials to enable me, to decide. If it had that effect, the right so conferred would be preserved by section 34 of the Act of 1898 without any reservation thereof in the vesting order or fiat. The promise was made long after Beatty had signed his agreement. There was no reference to any such right of way in Beatty's agreement. The difficulty is whether the verbal promise by Mr. McCoun to Beatty, after he had signed his agreement, had the effect of conferring a right of way over Chamberses' holding then in possession of the Land Commission? If it has that effect, the right would, as I have said, be still preserved as against the Chamberses, even if I strike out clause 9. This clause, as it now stands, was, I think, beyond doubt inserted without the knowledge or consent of the Chamberses or of their solicitor, and was not included in the terms of purchase as arranged by Mr. Pinkerton. I hold that it should now be struck out, on the ground that it was inserted by mistake and contrary to the intention of both parties to the agreement, *i.e.*, the Land Commission and the Chamberses.

I accordingly grant the motion, and order clause 9 to be struck out. That will leave the ground open for the parties to fight out their rights, if so advised, in the action pending in the Chancery Division. I regret that my efforts to effect a compromise have not succeeded.

J. E. W.

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John Beatty appealed (1).

S. L. Brown, K.C., and *A. M. Sullivan, K.C.* (with them *Cecil Forde*), for the appellant.

Serjeant Matheson, K.C., for the respondents (the Chamberses), raised the preliminary objection that no appeal lay.

[The Court intimated that they would hear the appeal subject to the respondents' right to rely upon the point thus raised.]

(1) In the Court of Appeal before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

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S. L. Brown, K.C. :—

Under section 34, sub-sect. 1, of the Local Registration of Title Act, 1891, where a title is registered as this necessarily and automatically was (section 22), the register is made conclusive evidence of the title of the owner as appearing therein. On two grounds and by two different methods of procedure only can the register be rectified, (*a*) on the ground of actual fraud, and mistake when an order may be made by any Court of competent jurisdiction, such as the Chancery Division in the pending action; (*b*) under sub-section (2) of section 34, where error occurs in the registration, whether of mis-statement, misdescription, omission, or otherwise, whether in the register or any map attached thereto; in such cases "the Court" upon such application and in such manner as may be prescribed may order rectification; but this is expressly limited to cases in which, in the opinion of "the Court," the error can be corrected without injury to any person. If the register cannot be rectified without causing such injury, there is no jurisdiction to interfere. Under section 13, "the Court" in this case means "the High Court," sub-sect. (1); and the jurisdiction under section 34 (2) is assigned to the Land Judge: section 13, sub-sect. 3; Consolidated Rules, R. 39. The Judicial Commissioner derives his jurisdiction under these sections as invested with the Land Judge's jurisdiction. Land Law (Ireland) Acts, 1896, section 23 (2), Rules 26th October, 1896. An appeal from the Registering Authority to "the Court," *i.e.* the "Land Judge," is given by section 14 (1). Registering Authority means, in Dublin, the Registrar of titles, and in other places, the Clerks of the Crown and Peace. Apparently under the expression "Land Judge" Ross, Wylie, and Madden, JJ. (Land Law (Ireland) Act, 1896, s. 24), have co-ordinate jurisdiction. Then under section 14, sub-section 4, an appeal to the Court of Appeal, from "the Court" is given either by special leave of "the Court" or in the case of a decision upon a question of law. The jurisdiction of Mr. Justice Wylie, to make the amendment here, is undoubtedly a question of law. The power to amend the vesting order or fiat, as if it were the register, is given exclusively to the Land Commission: Land Law (Ireland) Act, 1896, section 32 (3).

Here fraud is out of the case. Was there a mistake within the meaning of section 34(1)? "Mistake" there must mean mutual mistake: *Wilson's Estate* (1). That would be applicable to a case in which the Land Commission and the purchaser were the only persons concerned, and where by an error, common to both and affecting no third party, either too much or too little land was conveyed or the instalments were fixed at too high or too low a figure.

Wylie, J., apparently proceeded on the ground that there was such a mistake here, but in this, it is submitted, he was clearly wrong. Moreover, the proper forum for investigating such a question is the Chancery Division, in the action pending before the Master of the Rolls. He will have full power to deal with the whole case on the evidence adduced before him. But it was never intended that such a matter should be disposed of by the Judicial Commissioner on an interlocutory motion and on conflicting affidavits.

Then as to sub-section (2) can it be said that Beatty is not injured by the order of Wylie, J.? His right of way is taken away and he is deprived of the benefits he acquired by the registration. *Wilson's Estate* (1) is a conclusive authority that the appeal lies.

Serjeant Matheson, K.C., and *M'Cann, K.C.* (with them, *Dickie*), for the respondents:—

The contention of the appellant is, that the right of appeal is to be found in section 14 of the Local Registration of Title Act. But an appeal to this Court is only given in two cases, viz., by special leave of the Judge who makes the order, or upon a question of law.

A restricted right of appeal of that nature is very common in our legislation, *e.g.*, Registry appeals, appeals under the Workmen's Compensation Act, and other similar statutory procedure, and the Court of Appeal in such cases have uniformly been rigorous in declining to review the decision of the tribunal of first instance on a question of fact. Here there can be no doubt that Wylie, J., had jurisdiction to make the order in a proper case. What is a proper case

(1) 42 L. T. R. 122.

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is essentially a question of fact. Whether a person is injured within the meaning of sub-section (2) of section 34 is a question of fact, and one exclusively for the determination of the Judicial Commissioner. He is the person to form the opinion whether injury is done. The question whether there was any right of appeal was neither argued nor decided in *Wilson's Estate* (1). That question was not argued at all. The jurisdiction of Wylie, J., in this matter is under section 32, sub-section (3), of the Land Law (Ireland) Act, 1896. In *Talbot Crosbie's Estate* (2) and *White's Estate* (3), it was held that section 22 of the Purchase of Land Act, 1885, is still unrepealed; but that section only gave an appeal on a question of law. And this section cannot apply to the Local Registration of Title Act passed six years afterwards, and dealing with quite another subject-matter.

But, even if an appeal lies, the order of Wylie, J., is right. This is a vendor and purchaser contract between the Chamberses as purchasers and the Land Commission as vendors. Beatty could derive no right under it which would bind the parties to the contract. Wylie, J., has found, as a fact, that the reservation of the right of way claimed by Beatty was the outcome of a material mistake between the immediate parties to the contract, and this material mistake at once attracted the power conferred on him by section 34, sub-section (2), to rectify. Again, the order appealed from does no harm to Beatty. Such right of way, if it existed, would be preserved under section 34 (1) of the Land Law Act, 1896. If Mr. McCoun's promise was binding on the Land Commission when the agreement was fiated, its effect will not be lessened by striking out clause 9 of the agreement.

Injury in sub-section (2) of section 34 must mean an injury to some right existing independently of the purchase-agreement.

Brown, K.C., in reply :—

Section 13 of the Local Registration of Title Act gives jurisdiction to the High Court for the purposes of the Act, which by sub-section (3) is assigned to the Land Judge, who is a Judge

(1) 42 Ir. L. T. R. 122.
(2) [1905] 1 I. R. 570.
(3) 40 Ir. L. T. R. 6.

of the High Court. Under section 24 of the Land Act, 1896, Madden, J., was nominated by the Lord Chancellor an additional Land Judge for the purposes of the Local Registration Acts. Among the duties of the Judge is to correct mistakes (section 34) and to advise trustees (section 72). "The Court" has extremely important functions to discharge. The Judge dealing with the case is a Judge of the High Court exercising the jurisdiction of the High Court. "The Court" for the purposes of the Act and the jurisdiction order is the Land Judge or the Judge nominated by the Lord Chancellor, and by section 24 of the Judicature Act, 1877, an appeal to this Court lies from any order of a Judge of the High Court, save in certain cases excepted by the Act, of which this is concededly not one.

Section 14 of the Local Registration of Title Act is a section in effect limiting this general right.

The case can easily be tried out in the Rolls Court by adding the Land Commission as parties.

THE LORD CHANCELLOR :— Feb. 13.

If the appeal lies in this case, I do not think that the order of Mr. Justice Wylie should be retained. From the registration of the fiated agreement conveying the lands held by the Messrs. Chambers, subject to the right of way on foot, and with horses and carts, between the points E and F on the estate map, and in favour of the owners and occupiers for the time being of holdings in the townland of Grange, a right of way to the extent indicated became available as a matter of right to Mr. Beatty as an occupier of part of Grange, he having purchased his lands in Grange from the Land Commission, under a prior fiated agreement. What I have said is plain under section 30 (3) (*a*) of the Local Registration of Title Act, 1891. The right so given, while so existing, is a valuable acquisition to the lands of Mr. Beatty, and I think it is not possible to say that the formal deprivation of the right arising under the registration was not an injury to him. I think it was an injury within the meaning of section 34 (2) of the Local Registration of Title Act, 1891 ; and all that was said in

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this Court by the learned Judges who made the order in *Wilson's Estate* (1) is, I think, conclusive to that effect, that the injury sustained by Mr. Beatty owing to Mr. Justice Wylie's order excluded his jurisdiction to make the order now the subject of appeal. I approach therefore at once the question raised by the respondents' counsel regarding the right of appeal in this case. An important argument was put forward by Mr. Brown, K.C., in his reply, to the effect that the order was made by a Judge of the High Court, and he relied on section 13 of the Local Registration of Title Act, 1891, and section 24 of the Judicature Act, 1877. I personally do not desire to express any dissent from Mr. Brown on the matter; but, having regard to the course of the discussion before us on the subject, I think it better for the present occasion to confine myself to the substantial controversy raised before us. I may say at once that I have come to the conclusion that the right of appeal to this Court did lie. It was an order made under precisely the same jurisdiction, namely, under section 32 (3) of the Land Act, 1896, that was in question in *Wilson's Estate* (1). No objection was made in that case either at the Bar or by any member of the Bench, to the right of appeal, and I find it difficult to understand the omission, if at that time the professional view at all corresponded with the contention now put forward by the respondents' learned counsel. It is admitted that section 32 (3), which is included in Part III of the Land Act, 1896, is a provision in the Land Purchase Code in Ireland. By section 50 (4) of the Act of 1896, Part III of the Act is to be construed as one with the Land Purchase Acts, and the definition thereof includes the Land Purchase Act of 1885, containing section 22, granting a right of appeal to the Court of Appeal on all questions of law arising under that Act. The decision in *Wilson's Estate* (1) places, in my opinion, the present case upon that basis, for on the undoubted facts of the case, I hold as a matter of law that the jurisdiction to make the order appealed against did not in the circumstances exist. Under section 34 (2) of the Local Registration of Title Act there was no authority to make any correction in the vesting orders and fiats issued by the Land

(1) 42 Ir. L. T. R. 122.

Commission, and section 32 (3) of the Act of 1896 gives the authority to do so, providing that the jurisdiction of the Court, for the purposes of the Land Act, 1896, should be exercised by the Land Commission. It is contended that the Land Commission order is final and conclusive, as, it is alleged, the order of the Court exercising the original jurisdiction under the Local Registration of Title Act itself. I cannot accept that view, and I think that section 32 of the Land Act, 1896, must, for all purposes, be regarded as an integral part of the Land Purchase Acts, and, having regard to the express provision of section 50 (4), must be construed with the Land Purchase Act, 1885. The right of appeal provided by section 22 of the latter Act, in my opinion, applies to orders under the new jurisdiction given to the Land Commission by section 32 (3) of the Act of 1896. The leading case quoted against the *prima facie* effect of the direction that the Act of 1885 and Part III of the Act of 1896 should be read together, is *Talbot Crosbie's Case* (1). On its true construction, however, in my view, that decision is, on the contrary, an authority for holding that the right of appeal in this case does exist. Lord Justice FitzGibbon, as I understand his judgment, was of opinion that in the case of all orders under the Land Purchase Acts, under the direction to construe them together, the right of appeal under section 22 of the Act of 1885 existed. But in the elaborate judgment of the Lord Chief Baron, it is pointed out that that learned Judge laid it down that in the case of a new subject-matter created by a later statute, provision for an appeal in relation to another subject-matter, in a previous statute, with which the later may be directed to be construed, will not apply unless there be express enactment to that effect. He relied on *The Queen* v. *Wall* (2), where the facts illustrated clearly the proposition. The right under an Act to recover summarily tolls for the sale of coal does not apply to the recovery of tolls for the sale of hay and straw granted by a later statute, although directed to be construed with the former Act. It will be seen that the subject-matter in that case was new, and express provision was held to be necessary to apply the special power of recovering summarily the tolls for coal to the new toll

(1) [1905] 1 I. R. 570. (2) [1898] 2 I. R. 762.

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on the sale of hay and straw, which had no relation to or connexion whatever with tolls for coal. But in *Talbot Crosbie's Case* (1) the Lord Chief Baron decided that an appeal did lie under section 22 of the Act of 1885, in the case of the particular order then being considered under the Act of 1903, having, after a careful examination of the Acts, shown that the new jurisdiction really did not establish a new subject-matter, but was merely an amendment of the powers already existing under the previous Land Purchase Acts. The importance of having a right of appeal in these grave matters is shown by the action of the late Lord Chancellor, then acting as Lord Justice, as stated in his judgment in *Talbot Crosbie's Case* (1), and by Lord Justice Holmes as stated in his. The whole force of the judgment is, in my opinion, in favour of right of appeal in the present case. Here there is no creation of a new subject-matter within the meaning of *The Queen* v. *Wall* (2). It was a new addition to the existing jurisdiction of the Land Commission under the Land Purchase Acts in framing and issuing vesting orders, and making fiats, giving them a power of correcting and rectifying them in a case where no injury would be done to any person. That is the effect of section 32 (3) of the Act of 1896, and, accordingly, I think an order under it is as much subject to a right of appeal under section 22 of the Land Purchase Act, 1885, as would an order under any other provision of Part III of the Act of 1896. The appeal should be allowed with costs.

HOLMES, L.J.:—

Although there was considerable controversy as to matters of fact in the affidavits used before Wylie, J., I am of opinion that the result of this appeal depends upon the questions of law arising from circumstances about which there is no dispute. The Land Commission purchased from Patrick Leonard the untenanted estate of Grange in county Dublin, and sold a certain portion thereof to John Beatty, and another portion to Irwin Thomas Chambers and his brother John. The vendees had been previously in possession of evicted farms in other parts

(1) [1905] 1 I. R. 570. (2) [1898] 2 I. R. 762.

of the country; and I understand that the purchase and sales by the Land Commission were steps in the process of restoring the old tenants or their representatives to the holdings of which they had been deprived. But, whatever was the object, the sales to Beatty and Chambers were made and carried out under powers conferred by the Land Purchase Acts. The mode of conveyance was by agreements, executed by the Land Commission and the vendees, containing the terms of the contracts of sale which, on receiving in due course what is called the "fiat" of the Land Commission, were registered pursuant to the provisions of the Local Registration of Title (Ireland) Act, 1891, as subsequently amended.

This is now the position of the parties to this appeal. Each holds, with a parliamentary title, the fee-simple of the parcel of Grange purchased by him subject to the terms of their respective agreements, the only portion thereof to which it is necessary to refer being clause 9 of the Chambers' agreement. That clause is in the following terms:—"The purchaser hereby agrees that the said parcel of land is subject to, and may be vested in him subject to, a right of way for the owners and occupiers for the time being of holdings in the townland of Grange, and their heirs and assigns, on foot and with horses and carts, between the points E and F as shown on the estate map, produced to him by the inspector of the Irish Land Commission, as pointed out to him on the lands by the said inspector."

A portion of this clause is in the printed form used by the Land Commission; but as this form leaves blanks for the description of the right of way to which the parcel of land is to be subject, it would have had no operation if the blanks had not been filled in by manuscript. However, as it stood when executed by Messrs. Chambers, there can be no doubt it represented that the transfer to them of their parcel of Grange would be subject to the burden thus described. The agreement was settled by some officer of the Land Commission, who must have deliberately filled up the printed form, so as to make it read as I have copied it. Three of these inspectors and an assistant of the Messrs. Chambers' solicitor, himself a solicitor—were present when it was executed by them. One of the inspectors,

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James McCoun, signed it as witness of their execution, with the statement that it had been first read and explained to them in his presence. It would have been easy to ascertain in whose handwriting the blanks were filled up. We have, however, no information on this point; but it is evident by reference to the incorporated estate map that, notwithstanding the general terms of the description of the right of way, the burden was imposed solely in the interest of Beatty, as he was the only purchaser of a parcel of Grange who could have access thereto.

The affidavits used before Wylie, J., although, as I have said, containing contradictory statements, throw some light on how clause 9 assumed its present shape. Beatty swears with great circumstantiality that Mr. McCoun, the inspector already mentioned, told him that the farm would have to be worked in connexion with the county road over the way delineated on the map referred to in clause 9, and that after the execution of his agreement he was put in possession of the lands by Mr. McCoun, who pointed out the way in question, driving over it, and explaining to Beatty, who walked alongside his motor car, that the latter would be entitled to use the same on foot, and with horses and carts. Mr. McCoun also made an affidavit verifying, as I understand it, not only Beatty's account of what occurred when his agreement was executed, but also stating positively that before the Messrs. Chambers signed their agreement he particularly drew their attention to clause 9, which they appeared to fully understand. He adds that it was the intention of the Land Commission to reserve this right of way to Beatty for the more convenient enjoyment of his farm. Mr. McCoun, in a second affidavit, sworn five months later, says that the only right of way which it was his intention to confer on Beatty, and the only right of way asked for by the latter, was a right of way on foot—a statement which it is difficult to reconcile with his previous evidence that he particularly called the attention of the Messrs. Chambers to clause 9, which leaves no room for doubt as to the character of the right. The Messrs. Chambers join in an affidavit in which they say that Mr. Pinkerton was the inspector who negotiated the sale to them, and that nothing was said by him about the reservation of a right of way—a statement confirmed by Mr. Pinkerton himself—that they executed the

agreement without reading it, or hearing it read, and that they knew nothing of clause 9; that a week later Mr. M'Coun told them that Beatty was to have a footway from his house across their land, and that they said they would not allow anyone to have a right of way across their farm. Mr. Hayes, the representative of the solicitor of Messrs. Chambers, swears that he did not know nor did he hear anything about a right of way when their agreement was executed.

In referring to portion of the affidavits used before Wylie, J., I have not done so for the purpose of forming an opinion upon the questions of fact to which they relate. In the view I take of this case, this Court has no jurisdiction to decide those questions, and the only object of my observation thereon is to show that in the Chambers' agreement, clause 9, as it now stands, was not the result of accident, oversight, or mere error, but was the result of a deliberate, although, perhaps, a mistaken, intention of the Land Commission officials.

Beatty's case is that from the 30th March, 1909, when his agreement was executed, he used the way without interruption until May, 1910, when the brothers Chambers began to interfere with such user, and have continued the interference down to the present time. In consequence of such interference he began an action in the Chancery Division for an injunction to restrain it, as soon as the two agreements were fiated and registered under the Act of 1891; and upon his application to the Rolls Court for an interlocutory injunction the defendants asked that proceedings in this action should be stayed to enable them to make an application to Wylie, J., to rectify their agreement, and the fiat thereon by striking out clause 9 therefrom. This request having been granted, the defendants in the Rolls suit applied for and obtained from Wylie, J., the order for rectification which is the subject of this appeal.

There is no doubt that the application was made pursuant to section 34, sub-section (2), of the Act of 1891, and that if there was any jurisdiction to make the order it is given by that sub-section. The section relates to the conclusiveness of the register as to the title of the owner, and it enacts that the register shall be conclusive evidence of title, subject to two conditions—(1) the juris-

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diction of any Court of competent jurisdiction based on the ground of actual fraud and mistake to make an order directing the register to be rectified. It is, I understand, admitted that the effect of this condition is merely to preserve the jurisdiction of the Chancery Courts to set aside or reform an instrument upon the grounds that it was entered into by what is known as fraud or mistake in equity. Sub-section 2 relates to what is called an error in the registration, and enables the Court—that is the Court to which the duty of registration is entrusted—to correct such error, if in the opinion of the Court such error can be corrected without injury to any person. On comparing the language of the two sub-sections it would seem that the second was introduced to enable the Court to correct an error resulting from accident, oversight, or negligence, and not something that represented the mistaken intention of the framers of the instrument; but whatever be the object of sub-section 2, it is clear that an order can only be made under it if, in the opinion of the Court, the error can be corrected without injury to any person, whether such person is a party to the contract or not. Wylie, J., was fully alive to this, inasmuch as he says that if Beatty was entitled to a right of way his right would be preserved by section 34 of the Land Law (Ireland) Act, 1896, and it would be open for him to have his right decided in the pending Chancery action. This is the point on which I am obliged to differ from the Judicial Commissioner. Even if he were right in saying that section 34 of the Act of 1896 would or might apply, I should regard it as a serious injury to Beatty to deprive him of his most important piece of evidence, and to alter to his prejudice the burden of proof in the Rolls action. But it is absolutely certain that in the circumstances of the case the section would have no application. It preserves to a purchaser from the Land Commission all easements, rights, appurtenances, and privileges that attached to the land purchased previous to the purchase; but it is apparent that the right of way claimed by Beatty does not come within any item of this category. Leonard may have used this way, but he did so as owner of the land; and no counsel would argue that the oral statement of an inspector of the Land Commission could confer any right not granted or reserved under the corporate seal of that

body. I may add, however, that the retention of clause 9 would not prevent the Messrs. Chambers from having the register rectified under the first sub-section, either by an independent action or, perhaps, by making the Land Commission parties to and counterclaiming in the Rolls action.

These are my reasons for holding that the order appealed from cannot be sustained, provided the appeal lies.

This is the second matter for decision. Section 34 of the Act of 1891, under which Wylie, J., purported to make his order, does not mention an appeal, nor is an appeal referred to in that Act elsewhere than in section 14. I am of opinion, and I think that this is now admitted by the appellant's counsel, that section 14 is not applicable to the order of Wylie, J.; but it is said that "Court" in section 34 means the High Court, as shown by section 13, and that section 24 of our Judicature Act gives jurisdiction to the Court of Appeal to hear appeals from any order of the High Court, or any Judge thereof. I am not to be understood as dissenting from this proposition; and indeed I have ascertained that in an unreported case (*In re George Kane*) an appeal was heard in this Court, in June, 1901, from an order of Madden, J., acting as Judge of the High Court under the Statute of 1891, refusing an application under section 34, sub-section 2, made by a purchaser to correct the register by striking out a burden alleged to have been erroneously inserted therein. This appeal was heard without objection, and resulted in the order appealed from being affirmed.

However, I decide the point in controversy on different grounds. Section 32 of the Land Law (Ireland) Act, 1896, imposes on the Land Commission the duty of having the vesting order or fiat in the case of a purchase under the Land Purchase Acts registered; and sub-section 3 enacts that section 34 of the Act of 1891 (which relates to the correction and rectification of the register) shall extend to a vesting order or fiat, as if it was the register, save that the jurisdiction of the Court for the purposes of this Act shall be exercised by the Land Commission. This section 32 is portion of Part III of the statute; and section 50, sub-section 4, provides that Parts II, III, and V shall be construed as one with the Land Purchase Acts,

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one of which is 48 & 49 Vict. c. 73, the 22nd section of which enacts that any person aggrieved by a decision made on a question of law in proceedings thereunder may appeal therefrom to the Court of Appeal in Ireland. The effect of this section was considered in *In re Talbot Crosbie's Estate* (1), when it was held that this right of appeal exists where a question of law is decided under any statute that is declared to be construed as one with the Land Purchase Acts, unless a contrary intention is shown. No such intention is to be found in connexion with section 32 of the Act of 1896: therefore the appeal lies; and when this Court heard such an appeal in *Wilson's Estate* (2), we were acting within our jurisdiction, although the question was not raised therein.

CHERRY, L.J.:—

Upon the question as to the right of appeal in this case, I entertain no doubt. It was held in *Talbot Crosbie's Estate* (1) by this Court that a general right of appeal upon questions of law is conferred by the 22nd section of the Land Purchase Act, 1885, from any order of the Judicial Commissioner under the Land Purchase Acts; except in such cases (if any) as that right is expressly or impliedly taken away by some particular section of one of those Acts. The difficulty which existed in that case, and which led to the doubts of Holmes, L.J., and Walker, L.J., does not apply in the present case. There a question of law had been referred to the Judicial Commissioner by the Estates Commissioners under section 23 (1) of the Land Act, 1903; and it was at least open to argument that a decision upon such a reference was not within the general right of appeal conferred by the earlier Act. But here there is no such difficulty. The decision of Wylie, J., was made in exercise of the jurisdiction conferred upon the Land Commission by section 32 of the Land Act, 1896, which is one of the Land Purchase Acts. It has frequently been held that the right of appeal conferred by section 22 of the Act of 1885 extends to decisions under all the

(1) [1905] 1 I. R., p. 570. (2) 42 I. L. T. R. 122.

Land Purchase Acts. In the case of *Wilson's Estate* (1) an appeal was actually heard by this Court from an order made by Ross, J., acting as Judicial Commissioner, and exercising the very same jurisdiction as Wylie, J., exercised in the present case. Yet no one apparently even suggested that the appeal did not lie. If the question had been there argued, the decision would have been binding upon us; and the fact that it was not argued is, to my mind, a very strong indication that it was not deemed arguable by the counsel who appeared for the respondent.

Having arrived at the conclusion that an appeal lies under the 22nd section of the Land Purchase Act, 1885, it is not necessary to deal with the argument of Mr. Brown that in any event it would lie under the Judicature Act, notwithstanding the 14th section of the Local Registration of Title Act, 1891. We can safely leave any question which may arise as to the general right of appeal under the latter Act to be decided on another occasion; but I by no means desire to express an opinion that a general right of appeal does not exist from any decision of a Judge of the High Court exercising jurisdiction under the 34th section of the Local Registration of Title Act, 1891.

Upon the main question raised by this appeal I also agree with the Lord Chancellor and Holmes, L.J. The jurisdiction conferred by the 34th section of the Local Registration of Title Act to correct an "error" in the registration only exists where such error can be corrected "without injury to any person." I do not think that these words can be interpreted as meaning "without *injustice* to any person," I think that they mean "without disturbing, whether justly or unjustly, existing legal rights." Sub-section 2 was manifestly intended, in my opinion, to provide for cases where some clerical error or misdescription of a character not affecting the rights of third parties had crept into the register; but it was as clearly not intended for a case of the kind now before us, where a fierce legal contest exists between one of the parties to the agreement and another purchaser, and the correction sought to be made is for the purpose of this dispute. Such apparently was the view taken by this Court of the extent

(1) 42 I. L. T. R. 122.

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of the jurisdiction under the sub-section in *Wilson's Estate* (1), and no harm can be done by so limiting it, for by the 1st sub-section of section 34 the jurisdiction of any Court of competent jurisdiction "based on the ground of actual fraud or mistake" is carefully preserved. The Master of the Rolls will have full jurisdiction in the present case, if the proper parties are brought before him, to decide any such question after hearing all the witnesses examined and cross-examined. Without expressing any opinion as to which of the parties is right in this dispute, I think it is most certainly one not to be decided by a short cut in the manner in which the respondent here has sought to have it settled.

I agree that the order of Wylie, J., was made, therefore, without jurisdiction, and that it ought to be reversed.

Solicitors for Mr. Beatty: *Brown & M'Cann.*
Solicitor for Messrs. Chambers: *A. Dickie.*

W. G.

(1) 42 I. L. T. R. 122.

IN THE MATTER OF THE ESTATE OF JOHN SCULLY.

(E. C. 3272.)

Wylie, J.
1911.
Nov. 2, 15, 17.
Dec. 11.
—
Appeal.
1912.
Feb. 13, 14, 27.

Land Commission—Judicial Commissioner—Decision, whether subject to appeal—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 15 (1), (2)—*Middleman—Rescission of purchase agreement—Estates Commissioners—Declaration of "an estate."*

An appeal to the Court of Appeal lies from a decision of the Judicial Commissioner on appeal from an order or declaration of the Estates Commissioners under section 15, sub-sections (1), (2), of the Irish Land Act, 1903.

A document in the following form: "Declare an estate and sanction subject to marginal notes on Inspector's and Surveyor's reports being complied with," initialled at different times by two Estates Commissioners, is not a declaration that any particular lands are fit to be regarded as a separate estate for the purposes of the Act within the meaning of section 98, sub-section (1).

Where a landlord and his immediate tenant of a holding (partly sublet with the landlord's consent) agree for a sale through the Land Commission, they may, at any time before a declaration is made by the Estates Commissioners under sect. 15, sub-sect. (1), of the Act of 1903, mutually rescind the agreement, and thereupon all jurisdiction of the Land Commission under section 15, sub-sections (1), (2), with respect to that holding ceases.

MOTION on behalf of James O'Neill, one of the tenants on the estate for sale in this matter, by way of appeal against two orders or declarations of the Estates Commissioners under section 15 of the Irish Land Act, 1903, dated respectively 10th April, 1911, and 27th June, 1911, in respect of his intervening interest.

In 1905 an originating application by the vendor for the sale of his estate in the county of Tipperary was lodged with the Land Commission, accompanied by agreements for purchase of their holdings entered into between the vendor and his tenants. One of these was with James O'Neill, who held a farm at Emly, containing 10A. 3R. 30P., statute measure, at a rent of £24. Part of the holding, consisting of 3A. 3R. 5P., was subject to nine yearly

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sub-tenancies, £40 12*s.* 6*d.* being the aggregate yearly rent payable by the sub-tenants. The sub-lettings had all been made with the consent of the landlord. The price of O'Neill's holding was agreed on at £528, re-payable by an annuity of £17 3*s.* 3*d.*, payable as provided by the Irish Land Act, 1903.

On the 27th May, 1910, a report was received by the Estates Commissioners from their inspector, advising them that the portion of James O'Neill's holding in his own occupation was only security for £254, and that in the occupation of the sub-tenants, for £140.

The following document, which was relied on by the sub-tenants as a declaration of an estate, was afterwards drawn up:—

"Irish Land Commission,

"Estates Commissioners,

"Direct sales between landlord and tenant.

"Record No. E.C. 3272.

"Estate of JOHN SCULLY.

"Co. Tipperary, S. R.

"Declare an estate and sanction subject to marginal notes on inspector's and surveyor's reports being complied with,

"M. F.

"15th July, 1910.

"W. F. B.

"2 xi. 10."

Communications between the Estates Commissioners and the solicitors for O'Neill and his sub-tenants followed, the effect and result of which will be found stated in detail in the judgment of Mr. Justice Wylie. In effect, the Commissioners declined to advance more than £254 for the part in O'Neill's occupation. They proposed, with the consent of O'Neill, to apply section 15, sub-section (1), of the Irish Land Act of 1903; they proposed to advance £140 for the rest of the holding, the sub-tenants paying in cash sums amounting in the aggregate to £586. All the sub-tenants but one, Patrick Ryan (whose advance was

£5, and proposed cash payment was £35), signed agreements. James O'Neill refused to consent to this proposed arrangement.

A long correspondence ensued between the solicitors for O'Neill and Scully, the vendor, the effect of which, in the judgments both of Wylie, J., and the Court of Appeal, was a mutual rescission of the agreement to sell through the Land Commission Court, and a new agreement for Scully to sell, and for O'Neill to purchase, out of Court, O'Neill's holding for £591. This was communicated in writing by Scully's solicitor to the Estates Commissioners on the 16th March, 1911, with a request to exclude O'Neill's holding from the estate. A like notice and request were given to the Commissioners on behalf of O'Neill.

The Estates Commissioners, however, on the 10th April, 1911, made in the case of each of O'Neill's sub-tenants (except P. Ryan) a declaration that each such tenant was in exclusive occupation of the parcel of land sub-let to him, was thereby deemed the tenant of that parcel, and the said parcel was deemed a holding. This was followed by a further declaration made by the Commissioners in each case, on 27th June, 1911, reciting the previous declaration of 10th April, 1911, and that James O'Neill had not agreed as to the value of the interest intervening between the vendor and the sub-tenant; the Estates Commissioners declared that same be redeemed at the sum therein mentioned.

From these declarations O'Neill appealed to the Judicial Commissioner.

Chaytor, K.C., and *Sealy*, in support of the appeal.

Jellett, K.C., *Pigot, K.C.*, and *Mooney*, for the sub-tenants on part of O'Neill's holdings.

The arguments are fully referred to in the judgment of Mr. Justice Wylie.

Dec. 11.

WYLIE, J.:—

This is an appeal against two orders or declarations of the Estates Commissioners under section 15 of the Act of 1903, and raises most difficult questions as to the effect and operation of that section.

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In 1905 the vendor lodged an originating application for the sale of his estate in Tipperary, and agreements for the purchase by his tenants of the entire estate were entered into and lodged. One of the holdings on the estate was in the occupation of a tenant named James O'Neill, and by his agreement, dated the 15th November, 1905, he agreed to purchase his holding for £528, and to apply to the Land Commission for an advance of the whole purchase-money. This agreement set out his holding as containing 10A. 3R. 30P., and in the second schedule thereto it set forth the names of nine sub-tenants, and the rent payable by each, but not the acreage of their holdings. It appears that all these sub-lettings were made with the consent of the landlord, and, therefore, though not in actual occupation of the portion of his holding comprised in the sub-tenancies, O'Neill was, by section 57 of the Act of 1881, deemed for the purposes of the Land Purchase Acts to be in occupation of the whole. He was in a position, therefore, to enter into a valid agreement under the Acts for the purchase of the whole.

This not being a zone case, the inspector, according to the general printed instructions, had to report both as to security of the holding for the advance applied for and as to the existence of sub-tenancies, with full particulars as to each. The inspector reported that the holding was not security for £528, the whole purchase-money applied for; that the portion in the tenant's own occupation, containing about 7A., was only security for £254, and the portion in the possession of ten sub-tenants, containing in all about 3A. 3R. 5P., was security only for £140, making for the entire holding £394. He also reported that the sub-tenants were willing and anxious to buy their holdings at sixteen years' purchase of their rents, and to lodge in cash so much of the price as the Land Commission declined to advance, and he recommended that they should be allowed to purchase.

That report was received by the Estates Commissioners on 27th May, 1910, and on the 15th July and 2nd November, 1910, a minute was initialled by two of the Commissioners to the following effect:—

"Declare an estate and sanction subject to marginal notes on inspector's and surveyor's reports being complied with."

On the 5th September, 1910, the Estates Commissioners issued queries to the vendor's solicitor with a view to having these marginal notes complied with. That query sheet contains this statement, that "the Estates Commissioners are not prepared to advance more than the sums set out in column A for the purchase of these holdings, which sums do not include the price of the sub-tenancies in the case of No. 14," which was James O'Neill's holding. And opposite his name was "advance applied for, £528; amount in column A, £254." And further on, opposite James O'Neill's name and advance applied for, £528, is this statement—"Agreements for the purchase of sub-tenancies should be lodged as follows." Then follow the names of the ten sub-tenants; the area of each sub-tenancy; the price each tenant was prepared to give for his parcel in column 1, amounting in all to £726; the amount the Commissioners were prepared to advance in each case in column 2, amounting in all to £140; and the cash to be paid by each in column 3, amounting in all to £586. Then follows this statement—"The Commissioners are prepared to advance the amounts set out in column 2, and the amounts set out in column 3, being the value of James O'Neill's intervening interest, should be paid in cash by the sub-tenants, with James O'Neill's consent endorsed as shown"; and the endorsement was in these terms—"I consent to [blank for sub-tenant's name] being treated as tenant of the lands mentioned in within agreement, and that the price of his holding should be [blank for price in column 1], and in consideration of an advance of £254 being made to me for the purchase of the residue of my holding, and a sum of [blank pounds in column 3] being paid to me as the value of my intervening interest, I hereby waive any further claim in respect thereof."

Now, the effect of all that, if assented to by the vendor, O'Neill, and the sub-tenants, would have been to give the vendor only £394 instead of £528 for his interest, and to give O'Neill £586 for his intervening interest in the part sub-let. Why O'Neill did not accept such terms is best known to himself. But he undoubtedly refused to consent, and the vendor's solicitor on the 9th February, 1911, intimated to the Commissioners that vendor was willing to consent if the tenant, O'Neill, paid in cash the difference between the £528 and the £394.

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Shortly after this the vendor and O'Neill, who would not consent to such cash payment, made an arrangement for the purchase of the holding by O'Neill out of Court for the sum of £591, which was equal to the £528, the former price, and the amount of the bonus thereon. And, in answer to further queries, the vendor's solicitor, on the 16th March, 1911, informed the Estates Commissioners of this new arrangement, and asked to have O'Neill's holding excluded from the estate. O'Neill also informed the Commissioners to the same effect. Notwithstanding this, however, the Estates Commissioners on the 10th April, 1911, made a declaration under section 15 that each of O'Neill's sub-tenants was to be deemed a tenant, and that his parcel was to be deemed a holding; and notice of said declaration was given to O'Neill and the solicitor for vendor; and both again replied that O'Neill had offered to buy his holding from the vendor out of Court; the vendor's solicitor, however, stating that the vendor and O'Neill had not agreed as to the value of this intervening interest, and that the vendor was most anxious that the sub-tenants might be secured, provided he sustained no loss.

The next step was a declaration by the Estates Commissioners of the 27th June, 1911, fixing the value of the intervening interest in respect of each of the sub-tenancies. These, however, were not forwarded to the solicitors for the vendor and O'Neill until the 8th August, 1911.

In the meantime a further query sheet was sent to the solicitor for the vendor on the 28th June, 1911, stating that agreements should be lodged for the sub-tenants as follows:—Then it sets forth a new schedule for purchase by the sub-tenants, which differed from the previous schedule by slightly increasing the prices payable by all the sub-tenants, except one, by means of a somewhat larger advance in each case, keeping the amount of cash payments by the sub-tenants the same, but dividing the cash payments between the vendor and O'Neill, thereby securing the vendor his full purchase-money of £528 by means of increased advances and cash payments, and reducing the value of O'Neill's intervening interest from £586 to £498—not a good way of inducing O'Neill to consent. Then follows the statement that the sub-tenants' agreements should be endorsed with O'Neill's consent as before.

The outcome of this proceeding was that the vendor, having thus secured his full purchase-money, chiefly at the expense of O'Neill, signed an agreement for sale to each of the sub-tenants of his parcel upon the terms set forth in the above schedule, and all the sub-tenants signed such agreements except Patrick Ryan, but O'Neill naturally still refused to consent. The solicitor for the vendor intimated this result to the Estates Commissioners on the 24th July, 1911, and nothing further has been done by them except that on the 8th August, 1911, they forwarded to the parties the declaration of the 27th June.

Now, in this state of things, O'Neill has appealed against these declarations of the 10th April, 1911, and 27th June, 1911, and says, in effect, that, under the circumstances, the Estates Commissioners cannot put section 15 in force against him. This raises again the broad general question of whether section 15 can be put in force without the consent of the middleman.

But before dealing with the general question I must first consider some special grounds which counsel for O'Neill says exist in this case to prevent the Estates Commissioners from making the declarations complained of.

The first ground relied upon by Mr. Chaytor was that there has been, even up to the present time, no valid declaration of the "estate" under section 98, and, therefore, according to the decision of the Court of Appeal in *Weir's Estate* (1), the Estates Commissioners had no jurisdiction to make any declaration under section 15. Now, it is clear from that case that the declaration of an "estate" under section 98 is in the nature of a judicial determination by the Estates Commissioners, which, in the words of FitzGibbon, L.J., "is a condition precedent to putting the provisions of the Act into execution for the purpose of carrying out the sale" (2); and, indeed, according to section 15 itself, it is only "in case of the sale of an *estate*" that the power to make the declaration under that section arises, and it is impossible to know whether there is "a sale of an *estate*," until the estate is declared. The question in this case therefore is, whether the minute or memorandum, "Declare an estate and sanction subject to marginal

(1) [1908] 1 I. R. 172. (2) At p. 178.

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notes, &c., being complied with," which was initialled by one commissioner on the 15th July, 1910, and by another commissioner on the 2nd November, 1910, is a declaration by the Estates Commissioners under section 98 within the meaning of *Weir's Estate* (1). I have judicial knowledge of the fact that their usual mode of making such declarations is by a formal document unconditional in its terms, beginning, "It is hereby declared," specifying the lands comprised in the estate, and signed by their registrar, and usually endorsed on the originating application; while the minute or memorandum referred to is in form subject to certain conditions, does not specify any lands, and is not certified by any officer as a declaration or determination of the Estates Commissioners as a body. I should feel great difficulty in holding such minute or memorandum to be a valid declaration of the estate; but I would rather not decide this case on that ground, as it would not finally get rid of the difficulty that has arisen; because, if the declaration is not valid, the Estates Commissioners could still make a valid declaration, and afterwards make fresh declarations under section 15.

The second ground relied upon by Mr. Chaytor is, that the Estates Commissioners' ruling sent to the vendor's solicitor, that they were not prepared to advance more than the sum set out in column A, which in O'Neill's case was considerably less than the £528 applied for, amounted to a refusal to sanction the advance within the meaning of section 35 of the Act of 1896, which under that section made O'Neill's agreement to purchase void, and therefore there was not a sale of an estate including his holding, and section 15 cannot apply to it. The case relied upon by Mr. Chaytor in support of this contention was *Domvile's Estate* (2). The ruling sent to the vendor's solicitor in that case was, "The Commissioners are only prepared to advance the amounts, as shown in red, for these holdings," and these amounts were considerably less than the prices agreed upon and the amounts applied for. The purchasing tenants were afterwards quite willing to pay in cash the difference between the amounts the Estates Commissioners were willing to advance and the agreed

(1) [1908] 1 I. R. 172. (2) [1910] 1 I. R. 334.

price, and both they and the vendor were ready to sign fresh purchase-agreements on these new terms, on being directed so to do by the Estates Commissioners under section 12 (1) of the Act of 1909, provided the vendor was assured that he would receive a bonus of 12 per cent. The Estates Commissioners accordingly submitted to me the four questions set out at p. 336 of the report. The only decision I gave in that case was, "that the minute or ruling of the Estates Commissioners, that they would not advance more than £5,000 in each case, was not a 'direction' within the meaning of section 12 (1); and that if the new agreements contemplated in this case are now entered into, without a 'direction' of the Land Commission within the meaning of the section, they would be 'future purchase-agreements' within the Act of 1909." I expressed no opinion as to whether the ruling of the Estates Commissioners amounted to a refusal to sanction the advance within section 35 of the Act of 1896, or as to whether section 12 (1) applied to bonus. My decision was affirmed on appeal, but mainly on this ground, that the ruling referred to amounted to a refusal to sanction the advance, within the meaning of section 35 of the Act of 1896, whereby the original agreement became void, and therefore the fresh agreements, if entered into, would be future purchase-agreements. Now in that case no "direction" had been given by the Estates Commissioners under section 12 (1), and I pointed out that if hereafter, where new terms were agreed upon, the Estates Commissioners should give a direction under that section, a question as to the effect would arise and would have to be decided. Very shortly afterwards that question did arise in *Athlumney's Estate* (1), where the Estates Commissioners having issued an exactly similar ruling to that in *Domvile's Estate* (2), and the vendor and tenant purchasers, after negotiations extending over a year, having arranged new terms of purchase, the Estates Commissioners issued a "direction" under section 12 (1), and the vendor and tenant-purchasers executed fresh agreements embodying such new terms. Questions were then submitted to me as to whether these fresh agreements were "pending" or "future purchase-agreements" within the Act of 1909, and whether the

(1) 44 I. L. T. R. 261. (2) [1910] 1 I. R. 334.

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bonus would be 12 per cent. The Court of Appeal had in the meantime given their decision in *Domvile's Estate* (1), and as the judgments in that case appeared to me to lay down clearly that the ruling of the Estates Commissioners in that case was a refusal to sanction the advance, which made the agreements void, I decided in *Athlumney's Estate* (2) that the exactly similar ruling must be held to make the original agreement void, and that, therefore, the fresh agreements embodying new terms, even though executed pursuant to a direction under section 12 (1), could not be deemed to be in substitution, within the meaning of that section, for the original agreement previously made void. That decision was not appealed from. Then in *MacNamara's Estate* (3), in which the facts were identical with those in *Athlumney's Estate* (2), and the same questions were raised, I simply followed my decision in the latter case. On appeal, however, the Court of Appeal has now decided—*Domvile's Estate* (1) notwithstanding—that the ruling referred to was not a refusal to sanction the advance, which made the agreement void under section 35, and that the old agreement was still pending at the time when the direction of the Estates Commissioners under section 12 (1) was given, and that the fresh agreements were substituted agreements within the section. I am glad it is so decided, because the decision in *Domvile's Estate* (1) made it exceedingly difficult in many cases for the Estates Commissioners to carry out pending sales, and because I think the decision on this point in *Domvile's Estate* was not in accordance with Rule 45 of the Estates Commissioners' Rules, which requires a "refusal to sanction" to be signified by a certificate endorsed on the application. I, therefore, hold in this case, following the last decision of the Court of Appeal, that the Estates Commissioners have not refused to sanction the advance within the meaning of section 35 so as to make the agreement void.

Assuming, then, that the estate has been declared, and that O'Neill's agreement has not been made void by the ruling in question, I have now to consider Mr. Chaytor's third ground, which was, that the vendor and O'Neill, notwithstanding the

(1) [1910] 1 Ir. R. 334.
(2) 44 I. L. T. R. 261.
(3) [1912] 1 I. R. 38.

lodgment with the Land Commission of the originating application and the agreement for purchase, were at liberty, at any time before the agreement was sanctioned, to rescind it and enter into a new agreement for sale out of Court, and that the Land Commission having notice of such rescission could not further proceed to carry out the sale under the old agreement.

I have not been referred by counsel on the other side to any statute, rule, or authority which would, under the circumstances stated, prevent the vendor and O'Neill from thus exercising the ordinary legal right of two contracting parties, of rescinding the agreement and withdrawing it from the jurisdiction of the Land Commission. My only doubt on this point was, whether the vendor and O'Neill had legally rescinded their original agreement and entered into a new agreement for sale. This doubt was occasioned by the fact, that, while the vendor's solicitor informed the Estates Commissioners that O'Neill would not consent to the sub-tenants purchasing, and was willing to purchase out of Court for cash at £591, which the vendor was willing to agree to, and asked the Estates Commissioners to exclude the holding, yet stated that the vendor was anxious that the sub-tenants should purchase if he suffered no loss himself, and when the Estates Commissioners made a new arrangement whereby the vendor was to get his £528 in full, by a reduction in the value of the intervening interest, he signed the agreements with the sub-tenants; but after a careful reading of the correspondence between the solicitors for the vendor and O'Neill, from the 24th February, 1911, to the 14th March, 1911, I have no doubt that on the latter date a binding agreement was concluded for a sale out of Court at £591, and on the same date the vendor's solicitor gave notice of the new agreement to the Estates Commissioners, and asked that the holding should be excluded. It seems to me therefore, that after the 16th March, 1911, there was no agreement in existence in respect of O'Neill's holding with which the Estates Commissioners had any jurisdiction to deal, either under section 15 or otherwise.

The fourth ground relied upon was, that the declarations under section 15 were invalid. Well, that is really only stating a consequence of the three grounds already mentioned, if good,

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and of a further ground which I shall now deal with, viz. that the Estates Commissioners have no power to make these declarations and carry out sales to the sub-tenants without O'Neill's consent.

The question as to the powers of the Estates Commissioners under section 15 is one of great difficulty, and has been made more difficult by the way in which the question has been dealt with in previous cases: In *King Harman's Estate* (1), my predecessor, the Master of the Rolls, dealing with this matter says, "We are all familiar with the provisions of the earlier Acts which enable a tenant who has sub-let portion of his holding to be deemed in occupation of his holding. Before the Act of 1903, difficulties often arose in dealing with such cases. In many cases the Land Commission refused to advance money under the Land Purchase Acts, unless the tenant of the holding consented to a sale being made direct to his sub-tenants of the portions of the holding in their occupation. I think section 15 points at cases such as those I have referred to, and that the intention of the section is to leave the matter no longer dependent upon the consent and good-will of the tenant who is deemed to be in occupation of the holding, but to make it possible for the Estates Commissioners under the powers conferred on them to redeem the interest of the tenant so far as regards the portion of the holding in the occupation of the sub-tenants, in fact to do away with the necessity of obtaining consent in cases where it appears expedient to the Estates Commissioners to declare the sub-tenant, tenant of the parcel of land in his occupation, and further to declare that the parcel shall be deemed a holding." Now that is a very clear expression of opinion on the point in question, though it was unnecessary for the decision in that case.

The same question came before myself in *Moore Brabazon's Estate* (2), where R. J. Heenay, the purchasing tenant, had sub-let a portion of his holding to E. P. Heenay. In the course of my judgment I said:—"The Commissioners state that they required R. J. Heenay to endorse his consent on the agreement to be signed by E. P. Heenay, because without such consent

(1) 38 I. L. T. R., at p. 238. (2) (1) 42 I. L. T. R. 207.

there is nothing in section 15 which enables them to insist on R. J. Heenay purchasing the residue of the holding not included in the sub-tenancy, and in this I think they are clearly right." And further on I said this: "Where, however, the vendor has agreed to sell to his tenant his entire holding at a fixed price and such tenant has a portion sub-let with the consent of his landlord, the Estates Commissioners can adopt one or other of three courses: (1) they may sanction the sale subject to the sub-tenancy; (2) they may, with the consent of *all* parties, sanction the advance, and apportion it between the tenant and the sub-tenant, making the declaration under section 15 (1) and vesting in the tenant and sub-tenant the fee of the portions in their respective occupation; or (3), if the parties cannot come to any other agreement whereby the sale can be carried out as in No. 2, the Estates Commissioners can refuse to sanction the sale and, with the consent of the vendor, exclude the tenant's holding from the estate." Now, those were the only courses that, at that time, I saw open to the Estates Commissioners in dealing with such a case, and if the matter stopped there I would now have no difficulty. But unfortunately, in an earlier part of my judgment, I said this:—"The object and effect of section 15 seem to me to be perfectly clear. It gives the Commissioners power, if they think fit, to put a sub-tenant in a position to buy from the head landlord by declaring him to be tenant of the parcel of land which he occupies as sub-tenant, and that parcel of land to be a holding, so as to make the Land Purchase Acts apply to them, and this it seems to me they can do without the consent of the middleman, and without regard to whether the middleman has sub-let his own entire holding or only part of it." Now, that part of my judgment was entirely unnecessary for my decision in that case, where the sale had been already carried out with the consent of the middleman, and I was considering the section from an entirely different point of view, and it seems to me now to be inconsistent with the other parts of my judgment in which I expressed my opinion (1) that the Estates Commissioners could not insist upon the middleman buying the portion in his own occupation at an apportioned part of the price, without his consent,

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and (2), where I laid down that in such cases the Estates Commissioners had only three specified courses open to them in dealing with the case under section 15, none of which included compulsion against the middleman.

In cases were the middleman has entirely sub-let there is no difficulty, because by section 40 of the Act of 1909, the head landlord is given power to sell to the sub-tenants where the middleman's interest is not sufficient to enable him to sell, and section 15 is applied without the consent of the middleman, as it was in the case of *Macfarlane* v. *Booth* (1). But in cases where the middleman has only a part of his holding sub-let, and has entered into an agreement for the purchase of his entire holding, if the Estates Commissioners have no power to apportion the purchase price and compel the middleman to purchase the portion in his own occupation, how can the purchase-agreement that has been lodged in respect of the entire holding be carried out?

Now counsel for the sub-tenants who are anxious to buy their parcels, and are fighting this matter, have hardly ventured to argue that the Estates Commissioners can, without the consent of the middleman, compel him to buy the portion in his own occupation at a price fixed by themselves, and they have certainly not referred me to any statutory or other authority for the exercise of this power.

But it is said if the Estates Commissioners cannot compel the middleman to buy the portion in his own occupation, they can exclude that part from the estate, and include the part comprised in the sub-tenancies. If they do this, at what rent is the middleman to hold the excluded part in future? It has not been suggested that the Estates Commissioners have power to apportion the rent between the part in the middleman's occupation and that comprised in the sub-tenancies, and therefore if they exclude the portion in the middleman's occupation without being able to apportion a rent upon it, how is rent to be afterwards recovered out of the excluded portion? It appears to me, therefore, that unless the Estates Commissioners have power in such a case, without the consent of the tenant-purchaser, to apportion the

(1) [1910] 2 I. R. 12.

purchase-money between the part in his own occupation and that comprised in the sub-tenancies, and compel the tenant-purchaser to buy the part in his occupation at the apportioned price, or else to apportion the rent between such parts and exclude the part in the tenant's occupation subject to a legally apportioned rent, they cannot, in my opinion, carry through this sale without the consent of the tenant-purchaser in the manner proposed under section 15.

So far, the Estates Commissioners have not claimed this power, or sought to exercise it; nor has any question been submitted to me as to whether they have this power? If such a question is submitted to me, it must be done in a regular way and fully argued; and if they proceed, without submitting such question, to exercise a power which they do not possess, it is not my province to restrain them. That jurisdiction is in another Court.

As regards this appeal, I do not at present see how the appellant is, so far, damnified by the declarations made under section 15, because they are of no value, and cannot become operative unless the estate, including appellant's holding, is sold, and, according to the view of the Estates Commissioners, so far as expressed, that can only take place with O'Neill's consent.

J. E. W.

O'Neill's sub-tenants, with the exception of P. Ryan, appealed (1).

Jellett, K.C., *Pigot, K.C.*, and *Mooney*, for the appellants.

[*Chaytor, K.C.*, for O'Neill, objected that no appeal lay. The Court intimated that as in *Leonard's Estate*, *ante*, p. 215, they would hear the appeal, reserving the respondent's right to argue and rely upon the preliminary objection.]

(1) In the Court of Appeal before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

Appeal.
1912.

In re
SCULLY'S
ESTATE.

Jellett, K.C.:—

Prior to the Irish Land Act, 1903, sales under the Land Acts were frequently made to sub-tenants, but depending on the result of an agreement between four parties, the head landlord, the middleman, the sub-tenant, and the Land Commission, the procedure was cumbrous and protracted, often delaying and imperilling the sale of the estate, and sometimes for that reason abandoned, to the detriment of all persons interested in the estate. It was to bridge over this difficulty that section 15 of the Act of 1903 was passed. The preliminary step in the proceedings, the declaration under subsection 1, is left absolutely to the discretion of the Estates Commissioners. Once such a declaration is made, unless it be reversed by the Judicial Commissioner, the procedure of redeeming the intervening interests follows automatically—it is purely administrative. The only exception made is in sub-section 3, where the middleman could be himself a vendor under the Land Purchase Acts. The policy of section 15 is emphasized and extended by section 40 of the Irish Land Act, 1909.

Prior to the Act no sale could take place unless the middleman's interest could be redeemed: *In re Smith's Estate* (1). As to other difficulties of dealing with cases where there were middlemen, see *In re King Harman's Estate* (2).

Middlemen were never favourites with either of the political parties in their voluminous Land legislation. The power of surrender conferred by the Land Law (Ireland) Act, 1887, evidently showed that the Legislature thought that they would be wiped out by that Act; but as some of them survived, the *coup de grâce* was given by section 15 of the Act of 1903.

There was here a sufficient declaration of the estate to found the jurisdiction to make the subsequent declarations of April 10th and 27th July, 1911. The record number would enable any person interested to examine the originating application, and find the lands described as an estate. The marginal notes of the Inspector and Surveyor, though confidential documents, would, no doubt, be disclosed to anyone who could establish, to the satisfaction

(1) 3 Ir. W. L. R. 170. (2) 38 Ir. L. T. R. 237.

of the Commissioners, his right to inspect the same. If conditional, it was only so as regards the advance.

It may be a little informal, but it is not less so than the rulings upon schedules and allocations under which enormous sums are continually paid. If required, as in the case of rulings on schedules, a more formal order would have been drawn up and issued. It was a judicial determination: *The King* (*Vaugh and Hosie*) v. *Estates Commissioners* (1).

Then it is said because the Commissioners were not willing to advance the whole amount applied for, the sale of O'Neill's holding was at an end; but *In re MacNamara's Estate* (2) is an answer to this contention. On the facts, including the correspondence and query sheets, we contend that there was no rescission. But further, once the Commissioners had complete seisin of the case by declaring the lands in the originating application to be "an estate," the vendor and one of his tenants could have no power to withdraw a substantial part of the estate from the jurisdiction of the Commissioners without their consent.

As to the appeal being competent, Part 1 of the Act of 1903, in which Part section 15 is to be found, is to be construed with the Land Purchase Acts, including the Purchase of Land Act, 1885, section 22 of which gives an appeal on any question of law. That section has not been repealed or affected by sect. 24, sub-sect. 12, of the Act of 1903: *Talbot-Crosbie's Estate* (3). [Counsel read extracts from the judgment of the Lord Chief Baron at pp. 571, 573, and from that of FitzGibbon, L.J., p. 582.]

Chaytor, K.C. (with him *Sealy*), for O'Neill, the middleman.

There is no jurisdiction to entertain the appeal. There is no presumption of a right of appeal; it must be expressly conferred: *per* Lord Halsbury, *Osborne* v. *Barclay* (4). The Legislature when creating the Estates Commissioners as a new body to carry out the working of land purchase, never intended the decisions of this tribunal to be reviewed, save in the case of a pure question of law, and then only through the medium of submitting the question to

(1) [1911] 2 I. R. 11.
(2) [1912] 1 I. R. 38.
(3) [1905] 1 I. R. 570.
(4) [1901] A. C., at p. 278.

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the Judicial Commissioner under section 23 (1) of the Act of 1903. No such question of law was submitted in the present case.

Admitting, however, that this intention has not been sufficiently expressed, and that by section 22 of the Act of 1885, and the recent decision (1), an appeal lies from every decision of a Judicial Commissioner on a question of law, nevertheless upon the true construction of section 15 itself, it is clear a decision of the Estates Commissioners under that particular section—involving questions of fact as well as of law—was never intended to be carried further than to the Judicial Commissioner: see sub-section (5). It would be ridiculous to say that a party could appeal from a decision of the Judicial Commissioner to the Court of Appeal under section 15, but could not appeal from a decision of the Land Judge when exercising a like jurisdiction as the Estates Commissioners under the same section, which manifestly he could not do, as sub-section (6) expressly prescribes that no appeal shall lie to the Court of Appeal from any decision of the Land Judge. Assuming, however, an appeal does lie in the present case, it must fail upon at least four separate and distinct grounds:—

(1) Before the Estates Commissioners can proceed to put in force section 15 there must be a valid declaration of an estate, which is the foundation of their jurisdiction: section 98 (1) Act, 1903. There was no such declaration in the present case. If the extraordinary document relied upon purports to be a declaration of an estate, it is bad for at least four reasons—

(*a*) It is a provisional declaration ("subject to marginal notes," &c.), which is fatal according to the decision in *Weir's Estate* (2). The contention on the other side, that the conditions only attach to sanctioning the advance, is not sound. This document is not the sanctioning of an advance at all. Rules 29 and 45 of Rules, November, 1907, show how an advance is to be sanctioned, viz., by a certificate endorsed upon the originating application.

(1) *In re Leonard's Estate*, *ante*, p. 215. (2) [1908] 1 Ir. R. 178.

(*b*) It is not embodied in a proper order. The declaration of an estate is a judicial determination: see FitzGibbon, L.J., at p. 178, in *Weir's Estate* (1); *The King (Vaugh and Hosie)* v. *Estates Commissioners* (2). When acting under Part I. of the Act of 1903, the Estates Commissioners are exercising the powers of the Land Commission: s. 23 (1). The Land Commission, like any other tribunal, must speak by an order. Orders of the Land Commission must be signed by the Registrar: Rules, March, 1897, Order XXX, Rule 10; Cherry, 3rd ed., p. 847. The document produced bears no signature of any registrar.

(*c*) The declaration was made at different dates, and by only one Estates Commissioner present at the time.

(*d*) The lands are not sufficiently described.

(2) The advance applied for by O'Neill having been refused, the agreement for purchase fell to the ground: section 35, Act of 1896; *Domvile's Estate* (3). Wylie, J., seemed to think this decision, to a certain extent, had been modified by *MacNamara's Estate* (4), but this is not so. The distinction between the two decisions is very clearly shown by the judgment of Cherry, L.J., in the latter case, at p. 59.

The parties were then at liberty to cancel their former agreement, and enter into a fresh one, even if third parties suffered thereby: Pollock on Contracts, last ed., p. 225. An agreement to purchase under the Land Acts can be rescinded just as any other agreement: *Blackwood's Estate* (5); see judgment of Walker, L.C., at p. 389.

The parties did enter into a new agreement to buy out of Court as shown by the correspondence, and thereupon the powers of the Estates Commissioners in respect of that particular holding were stayed.

(3) The vendor and O'Neill having agreed to put an end to the original agreement before the declarations under section 15 were made, the latter were of no legal or binding effect. The

(1) [1904] 1 Ir. R. 178.
(2) [1911] 2 Ir. R. 11.
(3) [1910] 1 Ir. R. 334.
(4) [1912] 2 I. R. 38.
(5) [1909] 1 Ir. R.

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rights of sub-tenants cannot attach unless valid declarations are made. This, no doubt, involves the question whether the provisions of section 15 are of a compulsory character. In other words, if the declaration of the estate was valid, and the advance had been sanctioned, could the vendor or O'Neill withdraw from the sale, which, however, I submit does not arise for decision in the present case, and Wylie, J., so held at the end of his judgment. If it does arise, I submit they could. Section 15 was never intended to be anything more than an enabling section to remedy an existing mischief, the mischief being the existing difficulty in selling to sub-tenants under the earlier Land Purchase Acts. The sub-tenants had first to be constituted direct tenants to the head-landlord. This was not always possible. Recourse would often have to be had to section 17 of the Act of 1896, and even then a mortgagee might object and upset the matter altogether. There is not a word in the section suggesting compulsion. On the contrary, it says the Land Commission may make the declaration, and up to the present the Estates Commissioners have, as shown by their procedure, assumed the section is not of a compulsory character. If the Legislature intended the powers to be compulsory, they would have said so. Even if the section is compulsory, it is only so in cases where the entire of the middleman's interest is sub-let; otherwise what is to happen where part of his lands are left in his own hands? Must he buy this portion of the lands; or, if not, at what rent is he to hold the portion retained? There is no machinery pointed out in the section for dealing with these difficulties.

(4) Before section 15 can be put in force (compulsory or otherwise) there must be, in the opening words of the section, "the *sale* of an estate," *i.e.*, you must have not only an estate so declared, but the sale of that estate. But, unless you have agreements lodged for the purchase of an *entire* estate, it is not "the sale of an estate." Test it in this way. Suppose lands were included in the estate which belonged to someone other than the vendor, would that be "the sale of an estate"? Certainly not. Here O'Neill's holding was included, although the advance had been refused. Therefore, unless his holding was first excluded, there was no "sale of an estate," and, there was no power to make declarations

under section 15. Section 40 of the Act of 1909, relied on by the other side, has no application. It was passed to meet a special case.

Pigot, K.C., in reply.

[At the close of the arguments the Court intimated that they had come to the conclusion that the appeal lay, but desired to consider the case further before giving judgment.]

Feb. 27.

The Lord Chancellor:—

We have, during the argument, decided that the right of appeal to this Court against the order in question exists.

The facts of this case are of an exceptional character, and when first regarded are equally perplexing. Although at one time I thought that the occasion had arrived when the Court would be called upon to pronounce its opinion on the true meaning of section 15 of the Irish Land Act, 1903, and to give, as well, whatever assistance it could in providing a solution for the obvious difficulties in carrying it into execution, we find at the end of the discussion that the actual circumstances of the case preclude us from entering upon a subject of great importance in the administration of the Land Purchase Acts. As I understand the second last paragraph in Mr. Justice Wylie's judgment, he says that up to the present the Estates Commissioners have not claimed the power exercised by them in this case or tried to exercise it, nor had any question been submitted to him as to whether the power existed. He further stated that if such a question be submitted to him, it should be submitted in a regular way and fully argued. From this statement I infer that nothing in the learned Judge's judgment can be taken as an adjudication on his part regarding the construction of section 15 of the Act of 1903; nor has he given any indication of his views of the various steps to be taken and the course to be followed, on the assumption that the section could be put into operation against the consent of the middleman. I mention this matter so that in coming to the conclusion, as I do, that the learned Judge's order was right in this case, my decision shall not be taken to have any bearing on the great question involved.

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The Lord Chancellor.

Since the decision in *Weir's Estate* (1) there can be no doubt as to the necessity of the Estates Commissioners making an unqualified declaration, under section 98 (1), that the lands they are about to deal with, are fit to be regarded as a separate estate for the purpose of the Act, in order to establish their jurisdiction to take further action in the exercise of their various powers under the Act. It would be a superfluous course for me to consider the subject in any detail. The judgments of the learned Judges in *Weir's Case* (1) are definite on the point; and it is not a difficult matter to apply what they said to the alleged declaration said to have been made by the Estates Commissioners in the present case. It was signed by one of the Commissioners on July 15th, 1910, and by another over three months later, on November 2nd, 1910. Its form is: "Declare an estate and sanction subject to marginal notes on inspector's and surveyor's reports being complied with." No precise reference is made to the extent of lands included, and certainly without having the opportunity of seeing and hearing discussed the marginal notes on the inspector's and surveyor's reports, it would be impossible to hold with any confidence that the declaration of the estate and the sanction given were not both equally subject to the condition of compliance with those notes. We have not had the advantage of such a discussion, and can have no real knowledge of what the notes were, except in so far as it could be inferred from the queries submitted by the Commissioners at a later stage to the vendor.

It is no wonder that Mr. Justice Wylie, who is so familiar with the authorized practice relating to the making of declarations under section 98 (1) of the Act, and the regular form they take, should have found himself unable to accept the present declaration as the definite, unqualified act required to comply with the decision of the Court in *Weir's Estate* (1). I agree with the view of Mr. Justice Wylie in that respect. There has been no other declaration of estate in the case up to the present time, and that being so, it follows, on the view I take, that the jurisdiction certainly was not in existence on April 10th or

(1) [1908] 1 I. R. 161.

June 27th of last year, to enable the Commissioners to make their declarations of the respective dates under section 15 of the Act in favour of the sub-tenants on the lands.

The several queries produced in the argument would go to show that down to the present time, in the course taken by them, the Estates Commissioners have given no effective sanction to the advances necessary to carry out even the proposed purchases by the sub-tenants of their several parcels of land. Beginning with the queries of September 5th, 1910, and down to the final queries of June 28th, 1911, the financial proposals made by the Commissioners were definitely subject to the consent of Mr. O'Neill. The consent was never given, and at the present moment it would be difficult, even from the appellants' point of view, to determine the position of the sub-tenants.

In support of his general view on the case, Mr. Justice Wylie referred to the negotiations that took place between Mr. O'Neill and the vendor prior to April 10th, the date of the first declaration under section 15, by means of which the sub-tenants were deemed to be the tenants of their respective parcels of land, and the parcels themselves were deemed to be holdings. The negotiations were carried on by correspondence between the solicitors of the two parties. Mr. Scully, the vendor, for the purpose of a sale independently of the Commissioners, insisted on being paid by Mr. O'Neill the sum of £591, representing the original price agreed on, namely £528, and the estimated bonus, £63, on the advance, if the sale were carried out through the Estates Commissioners, and the advance was made. In reply to a letter of 11th March, 1911, from Mr. D'Alton, solicitor for the vendor, Mr. O'Neill's solicitor wrote on 15th March, 1911, a letter stating, "I have seen my client to-day and he has agreed to pay £528, and in addition the bonus, £63. Kindly let me have the abstract of title at your earliest convenience, and let me know how far the Land Commission has gone with the title." On March 16th Mr. D'Alton, on behalf of the vendor, wrote: "Yours of the 15th, stating that your client Mr. O'Neill has agreed to pay the £591, received. I will put the matter in train for completion." That same day, namely, March 16th, 1911, Mr. D'Alton, answering on Mr. Scully's part the queries sent to him by the

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Commissioners, dated February 10th, 1911, stated expressly that the vendor (Mr. Scully) requested that the holdings of O'Neill, and another tenant, named Glasheen, should be excluded from sale. Mr. O'Neill and Mr. Scully had indisputably agreed upon that course being taken. The declaration of April 10th, 1911, having been sent by the Estates Commissioners to Mr. O'Neill, his solicitors, on April 29th, wrote to the Secretary of the Estates Commissioners, saying that he was directed to inform him that Mr. O'Neill had made arrangements to purchase his holding from the vendor independently of the Land Commission. In like manner, on May 6th, 1911, Mr. D'Alton, on the part of the vendor, sent to the Commissioners a letter, in the course of which he wrote, "In reply to queries issued from the Estates Commissioners, I, on March 16th, 1911, requested that Mr. O'Neill's holding might be excluded from the sale, inasmuch as he had offered to pay Mr. Scully cash (£591), and purchase out of Court, and he is ready to do so still." There were other matters in the letter, but however they may have affected the position of Mr. Scully, they could not on the facts before us alter the agreement brought about by the previous correspondence between the vendor and Mr. O'Neill. Notwithstanding the vendor's request, expressly conveyed to them on March 16th, and the letters I have quoted, the Estates Commissioners went on unmoved. Several letters were written by Mr. O'Neill's solicitor, to discover the position taken up by the Commissioners, and on July 22nd, 1911, they wrote that the question of the purchase by the sub-tenant had not yet been finally disposed of by the Commissioners, and that, pending the settlement thereof, Mr. O'Neill should pay, as usual, the interest in lieu of rent, provided for in the agreement for purchase signed by him as same falls due. The reply from Mr. O'Neill, through his solicitor, on 27th July, 1911, after dealing with other matters, was that his rent or interest was quite safe, but that he did not wish to prejudice himself at present by payment. The same day the Commissioners made their second declaration, purporting to fix the value of the intervening interest (that of Mr. O'Neill) between the vendor and the sub-tenants. In the circumstances of the case I do not see by what authority they proceeded along the course I have indicated. The vendor's request

of March 16th should not have been neglected—without inquiry of any sort at any rate from Mr. O'Neill or, so far as I know, from the vendor. The vendor and the tenant had then agreed that the proceedings under the Land Purchase Acts should cease between them; and, at that point of time, no declaration had been made under section 15 in favour of the sub-tenants. Both on the ground of the inadequacy of the declaration under section 98 (1) of the Act, and on the ground just indicated of the agreement to withdraw the particular holding from the proceedings before the Commissioners, I do not think that on April 10th, 1911, or on June 27th, 1911, the Estates Commissioners had jurisdiction to make the declarations in question on this appeal. Mr. Justice Wylie's order must therefore be affirmed with costs.

Holmes, L.J.:—

The questions discussed on the hearing of this appeal have arisen from the 15th section of the Irish Land Act, 1903, which was passed to facilitate land purchase where an immediate tenant had a portion of his holding sub-let. Previous to that enactment the immediate tenant, if he had sub-let with the consent of the landlord, was in a position to enter into a valid agreement under the Land Purchase Acts for the purchase from him of the entire holding; but however desirous he might be to sell under the same Acts to his sub-tenants, he could not do so until after he had completed his own purchase, while in cases where the sub-letting was without consent, there was no way with which I am acquainted of applying the Acts to either the immediate holding or to the sub-tenancies.

Wylie, J., has stated very fully the circumstances that have given rise to the matters in controversy. In 1905 Mr. Scully presented an originating application for the sale of an extensive estate in Tipperary, and agreements for the purchase of the entire estate by his tenants were entered into and lodged. Amongst them was one dated the 15th November, 1905, made with James O'Neill for the purchase of his holding, measuring about eleven acres, at the price of £528, to be advanced by the Land Commission. O'Neill was in occupation of about seven acres, the remainder consisting of three or four public-houses in

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the village of Emly, and other small holdings being in the hands of sub-tenants, to whom the lettings had been made with the landlord's consent. The originating application and agreements were followed by the investigation and the report of the Inspector for the purpose of enabling the Estates Commissioners to determine, pursuant to the Irish Land Law Act, 1903, section 98, whether Mr. Scully's property should be declared fit to be regarded as a separate estate for the purpose of that Act, and also to enable them to fix the amount of the advance to be sanctioned in the case of each holding.

The Inspector's report having been received on the 27th May, 1910, someone in the office of the Estates Commissioners wrote on a sheet of paper, headed by a Record Number, and the words, "Estate of John Scully, County Tipperary, S.R.," the following words: "Declare an estate and sanction subject to marginal notes on Inspector's and Surveyor's Reports being complied with." These words have been written under them: "M. F., 15th July, 1910," and "W. F. B., 2 xi 10," the initials being, I understand, those of two Estates Commissioners. On the 5th September, 1910, the Estates Commissioners issued a document to the vendor's solicitor, stating that they were not prepared to advance more than £254 of the sum of £528 applied for by O'Neill, which sum of £254 does not include the price of the sub-tenancies.

Some time after this intimation was received, and before any further arrangement was made with the Estates Commissioners, negotiations began between Scully and O'Neill for the purchase by the latter of his holding directly from the former, and by two letters, dated the 15th and 16th March, 1911, following previous correspondence, an agreement was come to between the landlord and tenant for the sale out of Court of the holding by the former to the latter for the sum of £591, and on the last-named day, Mr. Scully's solicitor requested the Estates Commissioners to exclude the holding from the sale. Instead of doing so, the Commissioners on the 10th April, 1911, issued an order, contrasting in its formality with what is relied on as the declaration of the estate, by which they declared, pursuant to section 15, that Patrick Hennessy, who, as the sub-tenant of James O'Neill,

was in exclusive occupation of the parcel of land mentioned in the schedule thereto is deemed the tenant of that parcel, and the said parcel is thereby deemed a holding. This follows accurately the language of section 15. On the 27th June, 1911, the Commissioners issued a further order which, after reciting the previous one of the 10th April and that James O'Neill had not agreed as to the value of the interest intervening between the vendor and Patrick Hennessy, proceeded to declare that the same be redeemed at the sum of £23. I presume that there were similar documents bearing the same date relating to the holdings of eight sub-tenants of O'Neill, other than Hennessy, who are joined with him as appellants. The order of Wylie, J., made on an appeal pursuant to section 15, sub-section (5), to have these orders of the 10th April and 27th June set aside on the ground that the Estates Commissioners had no power to make them, allowed the appeal. From this the sub-tenants have appealed to this Court; and, although their right to appeal was questioned, it is now well settled that such an appeal is given by section 22 of the Purchase of Land (Ireland) Act, 1885, which is to be construed with Part I of the Act of 1903. I concur in the judgment appealed from on two grounds which I can state very briefly. It is admitted, and, indeed, it could not be denied, that no step can be taken under section 15 until the lands are declared fit to be regarded as a separate estate under section 98.

I am of opinion that there has been no valid declaration such as is thus required.

The memorandum with the two dates is not merely wholly defective in form as a judicial declaration for the reasons mentioned by Wylie, J., but it is made subject to marginal notes on two reports. I have not seen these marginal notes, as, although the papers were sent from the Land Commission to this Court, I was told that they were confidential, and I declined to look at documents which could not be seen by the litigants. It is, however, enough for me to say, that if there is a declaration of an estate, it is manifestly conditional and therefore void according to the decision of this Court in *Weir's Estate* (1). This would in itself

(1) [1908] 1 I. R. 172.

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be a sufficient ground for disallowing the appeal; but it may serve to prevent a further application to the Estates Commissioners if I add another reason. I shall assume that Mr. Scully's lands were legally declared to be fit to be regarded as an estate previous to the 5th September, 1910, and that immediately thereupon notices to the same effect as those of the 10th April last were served on the under-tenants.

If in these circumstances Mr. Scully had at once, without reference to the middleman, proceeded to enter into agreements to sell through the Land Commission to the sub-tenants, a serious question would have arisen as to whether such sales could have been carried out without the consent of O'Neill. It is not necessary to decide this difficult matter on the present occasion. Wylie, J., has not expressed a final opinion in reference thereto; and I shall say nothing further on the subject.

But there is another ground for dismissing the appeal, which will put an end to the present controversy. Whatever would have been the position of O'Neill in the circumstances I have assumed, Scully was under no obligation to enter into agreements to sell to the appellants. He and O'Neill could at any time have rescinded their conditional agreement under the Land Purchase Acts, and have entered into a direct and unconditional contract with each other for the sale and purchase of the fee-simple of O'Neill's holding, without being subject to any interference from the Estates Commissioners. This is precisely what they did; and when their contract was completed on the 16th March, and when on that day Scully's solicitor asked the Commissioners to exclude the holding from the sale of the estate, this request ought to have been at once acceded to. If this had been done, it would have prevented all further trouble.

The contract thus made between Mr. Scully and his immediate tenant rendered the declarations of the 10th April and 27th June, as well as the agreements entered into by Mr. Scully with the sub-tenants in July, valueless and void. Mr. Scully after the 16th March had ceased to be entitled to O'Neill's holding. O'Neill had become its equitable owner; and without his consent there could be no agreement for the sale of it or any part of it.

The appeal must therefore be dismissed.

Cherry, L.J.:—

On the question argued with such force by Mr. Chaytor as to the right of appeal to this Court from orders of the Judicial Commissioner under the jurisdiction conferred upon him by the 15th section of the Irish Land Act, 1903, I am clearly of opinion that such an appeal lies. I have so recently expressed in *Leonard's Estate* (1) my reasons for holding that the general right of appeal conferred by the 22nd section of the Land Purchase Act, 1885, extends to all orders made by the Judicial Commissioner unless such right is taken away by some particular section, that it is unnecessary for me now to repeat them. It is quite plain, I think, that the 15th section does not take away, either expressly or impliedly, the right of appeal from the Judicial Commissioner, though it undoubtedly does from the Land Judge.

A number of questions of great importance upon the true construction of this 15th section and of the amending section in the Land Act, 1909 (sect. 40), were discussed before us, but most of them need not be determined in the view I take of the case. It is sufficient for me to say that I agree with Wylie, J., that the orders of the Estates Commissioners appealed from are bad upon two grounds, neither of which affects in any way the general construction of the section.

In the first place, I think these orders are bad because there had not been any proper declaration of an estate before they were made. It was clearly decided by this Court in *Weir's Estate* (2) that such a declaration must be a judicial act; that it must be unconditional in its terms; and that it is (in the words of Fitz Gibbon, L.J.) "a condition precedent to putting the provisions of the Act into execution for the purpose of carrying out a sale of any lands." This decision is binding upon us, whether we agree with it or not, and however much we may deplore the practical difficulties which it causes in the administration of the Land Purchase Acts. Now, the document which has been relied upon here as the declaration of an estate is not, nor do I think it was ever intended to be, a judicial order at all. It is not signed by the registrar, as all orders of the Land Commission are required to be, by the rules. (See Order XXX,

(1) *Ante*, p. 228. (2) [1908] 1 I. R. 161.

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Rule 9, of the Rules of March, 1897). It appears to me to have been merely an office memorandum, which was intended to be followed by a more formal document. But such formal document was never, unfortunately, either prepared or executed.

It is not merely in point of form that this so-called declaration is defective. In substance it is equally bad. It does not specify any lands. It merely says "declare an estate." How can it be ascertained what lands are, or are not, to be included in this estate? It was argued by the appellants' counsel that it was intended to apply to all the lands, whatever they were, comprised in the originating application, and that by reference to the record number these lands could be ascertained. But I do not think that it was necessarily intended to include all these lands. The words are, "Declare an estate, and sanction subject to marginal notes on inspector's and surveyor's reports being complied with." This refers to two things—(1) the declaration of an estate, and (2) the sanctioning of advances to individual tenants; and it is clear that advances were only to be sanctioned when the requirements, whatever they were, of the marginal notes were complied with. If they were not, in any particular case, the advance was not to be sanctioned, and the holding should, in that event, have been excluded from the estate. The declaration of an estate was therefore not only vague and indefinite, but was also conditional and obviously bad under the decision in *Weir's Estate* (1), even if it had been correct in point of form.

A declaration of an estate in conformity with the law not having been made, the two orders appealed against have been clearly made without jurisdiction; and, strictly speaking, it is unnecessary to state any other ground for holding the orders bad; but I agree with Wylie, J., that if the orders are otherwise bad, it might lead to inconvenience and unnecessary expense to base the decision of the Court solely on this formal ground. It would be quite easy to have a proper order made declaring an estate, and for the Estates Commissioners then to make subsequent orders under the 15th section in the same terms as those now appealed against. If, therefore, the orders are bad on any other ground, it is better for us so to declare them at once.

(1) [1908] 1 I. R. 161.

In my opinion, these orders were bad on another and more serious ground. It is open, I think, to the parties to a sale of a holding under the Land Purchase Acts, in the same way as in the case of a private sale, to rescind their agreement by mutual consent;—at all events, if they do so before an order has been made sanctioning the advance. Whether they could do so after such sanction is another matter which we need not here consider, for the advance to O'Neill has never yet been sanctioned, and I think that the correspondence between O'Neill and Scully's solicitors, which has been put in evidence, proves conclusively that the agreement to sell through the Land Commission was rescinded by the parties to it on the 15th March, 1911. Whether or not a binding agreement was made to sell out of Court is a question which we need not decide; but on the 16th March, 1911, Mr. D'Alton, acting in this matter, I think, for both vendor and purchaser, applied to the Estates Commissioners to exclude O'Neill's holding from the estate; and, in my opinion, they were bound to comply with this request. I do not think they had, after that date, any jurisdiction to make any order declaring an estate which included O'Neill's holding. It follows that the orders appealed from, one of which was made on the 10th April, 1911, and the other on the 27th of June, 1911, were made without jurisdiction, and that this is a defect which cannot now be cured, unless Scully and O'Neill renew their agreement to sell under the Land Purchase Acts.

The other questions argued before us as to whether the sale to sub-tenants under the 15th section can in any case be carried out without the consent of the middleman, and as to the scope of the 40th section of the Act of 1909, need not be determined in this case; and they are so important, that it is better for us to refrain from expressing an opinion upon them until some case comes before us in which it is necessary to decide them.

I concur with the other members of the Court that the order of Wylie, J., should be affirmed.

Solicitors for the sub-tenants: *G. D. Fottrell & Sons.*
Solicitor for James O'Neill: *John O'Dwyer.*
Solicitor for the vendor: *Michael D Alton.* W. G.

Ross, J.
1912.

HEAD *v.* MEARA.

Feb. 20, 27. *Conveyance—General words—Easement—Right of way—Continuous and apparent easement—Unity of possession—Implied grant.*

Two adjoining hereditaments, A and B, belonging to the same owner were the subject of an absolute order for sale in the Land Judge's Court. Over B there was a formed road constructed by the owner and used, but not as a way of necessity, for the purposes of A. B was dismissed out of Court, and A, "with the appurtenances," was subsequently conveyed by the Land Judge to a purchaser.

Held, that a right of way over the formed road passed to the purchaser.

Query, whether the Conveyancing Act, 1881, applies to a Land Judge's conveyance.

TRIAL OF ACTION.

The action was brought by the plaintiff for £100 damages for wrongfully obstructing a general right of way from the plaintiff's house at Derrylahan, in the county of Tipperary, through the lands of Ballyduff to the county road, and for an injunction.

The facts sufficiently appear in the judgment of Ross, J. The Land Judge's conveyance, under which the plaintiff claimed, was dated the 14th May, 1902, and granted to the plaintiff the lands of Derrylahan, "described in the annexed map, with the appurtenances."

R. F. Harrison, K.C., and *F. W. Price*, for the plaintiff.

Littledale, K.C., and *W. G. Shannon*, for the defendants:—

The mortgage by the plaintiff's predecessor in title extinguished any right of way: *Taws* v. *Knowles* (1). As to the form of conveyance by the Land Judge, the Conveyancing Act, 1881, does not apply to Land Judge's conveyances, so as to import general words. The words "with the appurtenances" do not include a right of way: Goddard, Law of Easements, p. 154; *Birmingham, Dudley, and District Banking Company* v. *Ross* (2).

(1) [1891] 2 Q. B. 564. (2) 38 Ch. D. 295.

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R. F. Harrison, K.C., in reply :—

A "formed road" is considered to be a continuous and apparent easement, and passes without general words : *Brown* v. *Alabaster* (1). The word "appurtenances" is sufficient to carry a right of way : *Thomas* v. *Owen* (2). Easements may be acquired under the general words under the Conveyancing Act, 1881 : Goddard, Law of Easements, p. 143.

Feb. 27.

Ross, J. :—

The action is brought to restrain the defendants from obstructing a right of way, and for damages.

The plaintiff, Major Head, is the owner of Derrylahan, county Tipperary. The defendants are in occupation of Ballyduff, the adjoining lands. The plaintiff claims the right to use an avenue, which passes through the defendants' lands and opens into the county road leading to Birr. There is another avenue on the plaintiff's lands, which strikes the county road at a point about a mile distant from the entrance to the avenue in dispute. The avenue in dispute is not a way of necessity. In 1874 William Henry Head, the former owner of Derrylahan, bought Ballyduff, and during the seventies, or at all events before the year 1883, he constructed the avenue in dispute, partly over Derrylahan and partly over Ballyduff. A gate was put up attached to substantial piers at the point where the avenue passes from Derrylahan into Ballyduff, and a culvert was constructed. Two other piers and a gate were put up at the point where the avenue opens on the Birr road. Trees were planted on each side of the avenue at this point for ornamental purposes. The avenue seems to be a well-defined road, metalled and well constructed. It has been kept in repair by the Head family or the occupants of Derrylahan. It has been used regularly by them since its construction down to the October of 1910, when it was obstructed by the defendants and the right to use it denied.

On the 18th October, 1888, W. H. Head died, and was succeeded by William Edward Head, his eldest son. This gentleman got into the hands of a money-lender named Joyce. By deed of 22nd April, 1891, he mortgaged Derrylahan and

(1) 37 Ch. D. 490. (2) 20 Q. B. D. 225.

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Ballyduff to Joyce, to secure a considerable loan. On the 20th October, 1891, Joyce was paid off by Mr. John A. French, solicitor, and the mortgage assigned to Mr. French. By the said deed the said two properties were mortgaged to Mr. French to secure the sum so advanced. Both denominations were subject to the jointure of Mrs. Isabella Head, the mother of W. E. Head. She had presented a petition for the sale of both properties to the Land Judge's Court in respect of her arrears. An absolute order for sale was made, and a receiver was appointed.

By an order made on the 12th December, 1900, the petition, so far as it related to Ballyduff, was dismissed and the receiver discharged. On the 14th May, 1902, the Land Judge conveyed the lands of Derrylahan to the plaintiff, Major Charles O. Head, described in an annexed map, with the appurtenances. On the 31st October, 1904, William E. Head conveyed his equity of redemption to the said John A. French in Ballyduff and other lands. The defendant, Patrick Meara, has been in occupation of part of the lands of Ballyduff for about twenty years, sometimes as grazing tenant and at one time under tenancy to William E. Head, which was determined by an ejectment brought by Mr. French. He has now agreed with Mr. French for the purchase of the lands through which the avenue in dispute runs, under the Land Purchase Acts.

There is no conflict of evidence as to the material facts. The whole question is, whether this avenue passes by implication of law or under the general words used in the Land Judge's conveyance of 1902. In the view I take, it becomes unnecessary for me to consider the question raised as to the effect of the Conveyancing Act on Land Judge's conveyances.

The law applicable to this suit has been discussed in very numerous cases. There have been, I think, differences of judicial opinion, but the principle seems to me now to be clearly settled. If there are two adjacent properties belonging to the same owner, and over one of them there is a formed and constructed road, which has been, and is, in fact, used for the purposes of the other, when the other is conveyed, a right of way over the road will pass to the grantee: *Bayley* v. *Great Western Railway Company* (1). Does it make any difference that the road was made during the

(1) 26 Ch. D. 434.

unity of possession of the two properties, and had not existed before the unity of possession? I think it is now settled law that it makes no difference. Does it make any difference if there are no apt general words? I think not, but there are adequate general words in this conveyance.

All this doctrine is founded on the principle that a man must not derogate from his own grant. If a man sells a house with windows, and retains the surrounding land, he must not the next day block up the windows. In the case of a severance of two properties it is presumed that everything in the nature of an easement, everything that is reasonably necessary for the enjoyment and use of the part granted, every reasonable adjunct that is continuous in use and apparent to the eye must be taken to pass with the property granted.

It is decided that a formed road leading to a house is such an adjunct, and that it will pass without general words at all: *Brown* v. *Alabaster* (1). It has also been decided that a formed road will pass under the word "appurtenances": *Thomas* v. *Owen* (2). Therefore, a right to use this formed road, which was constructed for the benefit of the residence in Derrylahan, and has been used continuously for more than thirty years, passed under the words of grant in the deed, and most certainly this is so when the property is conveyed "with the appurtenances."

The defendants rely upon the mortgages as affecting the question in dispute. Now, if the owner of the two properties situated as I have described were to make a regular legal mortgage of the property on which the road exists without reservation, what would be the result? I think the road would pass with the property mortgaged, and the mortgagor could not recover the use of his road until he had paid off the mortgage. But that is not this case.

Here both properties are mortgaged to Joyce. An absolute order for sale is made in the Land Judge's Court. The proceedings, by a petition in that Court, are not for the benefit of petitioner alone. They are in the nature of a representative suit. The absolute order enures for the benefit of all incumbrancers, including Joyce; and all such incumbrancers are bound by the procedure

(1) 37 Ch. D. 490. (2) 20 Q. B. D. 225.

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adopted in the matter. Where the lands are in hands and unburdened by tenancies, the Court can do anything it thinks for the benefit of the parties interested in the estate. It can sell the lands in separate lots. It can create rights of way to the several lots, or it can destroy *quasi*-easements where they existed before. It can sell so much as is necessary to discharge incumbrances, and it can allow the parties interested in the unsold portion to take it out of Court, and dispose of it as they think most for their advantage.

Now, what was done here was that Derrylahan, *i.e.*, the mansion with all its appurtenances, and the lands, were put into one lot for the purpose of regular sale through the Land Judge's Court. The proceeds of the sale were applied in payment or satisfaction of some of the incumbrances, and in relief of all that were not so satisfied. By the consent of everybody Ballyduff is taken out of Court, but Derrylahan, with its appurtenances, is retained and sold. One of the adjuncts or appurtenances is this avenue on Ballyduff. The mere dismissal out of Court of Ballyduff in no way frees it from its servitude in respect of the avenue. The dismissal is not a conveyance. It merely means that it is not necessary to sell through the Court for the present. It could be brought into Court again on another petition, and the proceedings consolidated with the former matter.

When the conveyance of Derrylahan was made, it carried with it the right to use the existing formed road in Ballyduff. For these reasons, I am of opinion that the defence wholly fails. I think the defendants were not acting wantonly, but under a belief that they had a right to close the avenue. I will, therefore, only give £1 by way of damages. I will grant an injunction to restrain them from further obstructing the avenue. The costs of the action must follow the event.

[*R. F. Harrison, K.C.*: In the first edition of Wolstenholme's Conveyancing Acts, in a note to section 70 of the Act of 1881, the author, who was the draftsman of the Act, refers to Land Judges' conveyances.]

Solicitor for the plaintiff: *Richard F. Barry.*
Solicitor for the defendant: *John J. Kennedy.*

D. M. S.

JACKSON *v.* YEATS.

Barton, J.
1912.
March 28.

Administration action— Legatee indebted to firm of which testator was a member—Executor not entitled to retain legacy.

An executor cannot, as a general rule, retain a legacy in satisfaction of a debt which was due by the legatee, not to the testator, but to a firm in which the testator was a partner.

FURTHER CONSIDERATION.

This was an action brought by the executor of George Thomas Pollexfen, deceased, to administer his personal estate. By his will, dated December 18th, 1907, the testator bequeathed, *inter alia*, one-ninth of his residuary estate (which consisted of about £45,000), upon trust for his brother Charles William Pollexfen absolutely. From a statement of account dated August 31st, 1891, it appeared that the firm of C. W. Pollexfen & Co., of Liverpool, of which Charles William Pollexfen was the sole surviving member, was on that date indebted to the firm of W. & G. T. Pollexfen & Co., of Sligo, in the sum of £9967 0*s.* 10*d.* By various credits the said indebtedness was reduced to £8807 0*s.* 7*d.*, at which figure the amount stood on December 31st, 1894. A further credit noted in the books of W. & G. T. Pollexfen & Co. on March 31st, 1904, reduced the indebtedness to £8738 8*s.* 9*d.*, at which amount it remained at the date of the death of the testator, George Thomas Pollexfen. The firm of W. & G. T. Pollexfen & Co. had consisted of three partners, namely, William Pollexfen, the said George Thomas Pollexfen (the testator), and the plaintiff. William Pollexfen died on November 12th, 1892, and George Thomas Pollexfen died on September 26th, 1910, leaving the plaintiff, who was

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also testator's sole acting executor, the surviving partner in the firm of W. & G. T. Pollexfen & Co. On the further consideration of the chief clerk's certificate, the question was raised whether the plaintiff, as the executor of the testator, was entitled to retain the one-ninth share of the testator's residuary estate bequeathed to Charles William Pollexfen in satisfaction of the debt due by Charles William Pollexfen to the firm of W. & G. T. Pollexfen & Co., in which the testator was a partner.

S. L. Brown, K.C., and *Gustavus Hamilton*, for the plaintiff:—

It is settled law that a legatee who is indebted to the testator's estate must make good his indebtedness before he can claim anything from the testator's bounty. We contend that this principle applies where the debt is one due to a firm of which the testator was a member, as in the present case.

We seek to recover whatever share is due in equity by Charles William Pollexfen to the estate of George Thomas Pollexfen. It is true that a debt due by a firm cannot be set off against a legacy to a member of the firm. But *Turner* v. *Turner* (1) was decided on the ground that the testatrix could not have sued the legatee alone for the debt due to her by the firm of which he was a member, and that reasoning does not apply to the present case, which is the converse.

The plaintiff, as surviving partner, could now sue for this debt if it was not statute-barred. It is settled law that an executor can obtain a legacy in satisfaction of a statute-barred debt. The true test is, does the legatee owe money to the estate? The principle is, that a legatee by whom money is due in equity to the testator's estate must make good his indebtedness before he can claim anything from the estate. We rest our contention on the broad principle that Charles William Pollexfen must come into this Court to get his legacy, and therefore he must pay his equitable debts before obtaining the assistance of the Court. The principle of *In re Wheeler*; *Hankinson* v. *Hayter* (2) governs the case.

(1) [1911] 1 Ch. 716. (2) [1904] 2 Ch. 6

A. W. Samuels, K.C., and *J. Craig Davidson*, for certain of the residuary legatees.

The right of the executor to retain the legacy in satisfaction of the debt is not a right of "set off." The testator was entitled to half the assets of the firm. The legatee must increase the general mass of the estate by paying his debt before he can participate in any benefit coming from the estate: *Re Akerman*; *Akerman* v. *Akerman* (1). The mere fact that the debt is the testator's share in the assets of a firm cannot make any difference. They cited *Courtenay* v. *Williams* (2); *Maybery* v. *Brooking* (3); *Re Bennett*; *Ex parte Kirk* (4); *Re Sewell*; *White* v. *Sewell* (5); *Re Rhodesia Goldfields, Ltd.*; *Partridge* v. *Rhodesia Goldfields, Ltd.* (6); Williams on Executors (1905), pp. 1049, 1050.

Herbert Wilson, K.C., and *Mooney*, for Charles William Pollexfen:—

The executor's right to retain a legacy in satisfaction of a debt does not extend to a case like the present, where the debt was due not to the testator personally, but to a firm in which he was a partner. The right test is, was the debt payable to the testator's estate? The plaintiff here could only recover this debt in his capacity of surviving partner in the firm of W. & G. T. Pollexfen & Co., while he could only retain the legacy as the testator's executor. Cross-demands existing in different rights can never be set off against each other: *Freeman* v. *Lomas* (7). The decision in *Turner* v. *Turner* (8) governs this case. See also *Cherry* v. *Boultbee* (9); *Re Batchelor*; *Sloper* v. *Oliver* (10); *Re Wheeler* (11).

(1) [1891] 3 Ch. 212.
(2) 3 Ha. 539.
(3) 7 De G. M. & G. 673.
(4) 5 Ch. D. 800.
(5) [1909] 1 Ch. 806.
(6) [1910] 1 Ch. 239.
(7) 9 H. 109.
(8) [1911] 1 Ch. 716.
(9) 4 Myl. & Cr. 442.
(10) L. R. 16 Eq. 481, at p. 483.
(11) [1904] 2 Ch. 66.

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Sergeant Matheson, *K.C.* (with him, *Norwood*), for Frederick Henry Pollexfen, one of the residuary legatees :—

We support Mr. Wilson's contention, because this money, if retained by the executor, would not swell the testator's assets, but would be the property of the surviving partner in the firm.

Poole, for the defendant, a residuary legatee :—

Set-off has nothing to do with the present question. Here the plaintiff claims the debt as surviving partner in the firm, but when he has recovered it, half of it belongs to the testator's estate, therefore it is a debt due to a person who is in fact a trustee for us. The case is similar to *Lawford* v. *Bruce* (1), where it was decided that one who was entitled to a share in the residuary estate of his father, and was also residuary legatee and executor of his aunt, who was a debtor to the father's estate in respect of a statute-barred debt, was not bound to account as against his share under his father's will.

BARTON, J. :—

The question for decision is whether the executor may retain the one-ninth share of testator's residuary estate, which was bequeathed upon trust for his brother Charles William Pollexfen, in part or full satisfaction of a debt due by the legatee not to the testator or to his estate, but to the firm of W. & G. T. Pollexfen & Co., in which the testator was in his lifetime a partner. That question must, in my opinion, be answered in the negative.

It is well settled that a legatee, indebted to the testator, can receive nothing from the testator's bounty until he has brought into account the amount of the debt. But, in order to render this rule applicable, the legatee must have been indebted to the testator. If so, he has assets of the testator in his hands, by bringing in which he is bound to increase the estate before receiving anything out of it : *In re Akerman* (2) ; *In re Wheeler* (3) ; and *Turner* v. *Turner* (4), the converse of the present case, in which *Smith* v. *Smith* (5) was explained.

(1) [1908] 2 Ch. 682.
(2) [1891] 3 Ch. 212, 219.
(3) [1904] 2 Ch. 66, 71.
(4) [1911] 1 Ch. 716.
(5) 3 Giff. 263.

It is true that a debt may be retained although barred by the Statute of Limitations. But it must have been a debt due to the testator, even though statute-barred

It would appear that the executor, if this debt were paid to him by the legatee, would have to pay it over to the surviving partner. It would not swell testator's assets. North, J., said in *In re Watson* (1): "There is no equity by virtue of which the executors can retain a debt due, not to the testator's estate, but to some other person, in order that they may hand over the amount retained to that person." *Maybery* v. *Brooking* (2) turned upon the identification of a debt described by a testator in his will as due to him from the legatee's late husband. There was nothing answering to that description, except a debt due to a firm of which testator was partner; and it was held, on the construction of the will, to be a bequest of the testator's interest in the debt due to the firm. The decision was, however, grounded upon the hypothesis that, *prima facie*, a debt of this kind was not a debt due to the testator, and also upon an admission by the executors that the accounts of the firm could be so adjusted, as between the estate of testator and the surviving partner, that the debt due to the firm could be taken as part of the testator's share of the partnership estate.

The other authorities, *In re Batchelor* (3), *Cherry* v. *Boultbee* (4), *Ex parte Kirk* (5), which was the converse of *Maybery* v. *Brooking* (2), and *Freeman* v. *Lomas* (6), support the view that the legatee must be a debtor to the testator's estate. It is not exactly a set-off. The reason is that the legatee has assets of the testator in his hands. But, in order to be assets in hand, the debt must be due to the estate; and this debt, which was due to the firm of which testator was a partner, does not come within that description.

It may be possible to suppose circumstances under which a debt due to a partnership might, for the purposes of this rule of retainer, be, or might have become, or might have to be regarded as a debt due, or involving ascertainable liability, to the separate estate of a deceased partner. But it has not

(1) [1896] 1 Ch. 925, at p. 937.
(2) 7 De G. M. & G. 673.
(3) L. R. 16 Eq. 481, at p. 483.
(4) 4 M. & Cr. 442, at p. 447.
(5) 5 Ch. D. 800.
(6) 9 Hare, 109.

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been suggested that there are any such circumstances here. The executor's claim to retain the legacy cannot, in my opinion, be maintained.

Solicitors for the plaintiff: *Hamilton & Craig.*
Solicitor for certain of the residuary legatees: *Norris Goddard.*
Solicitors for Charles William Pollexfen: *G. D. Fottrell & Sons.*
Solicitors for Frederick Henry Pollexfen: *Edwards & Good.*
Solicitors for the defendant: *Baker, Ringwood, & Gordon.*

R. W. L.

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BROWNE *v.* BROWNE.

Jan. 25, 31. *Will—First codicil—Second and third codicils—Legacy—Alteration of amount—Revocation—Confirmation—Legacy on condition of acting as trustee—Sufficient intention shown.*

By his will, dated October 21st, 1899, a testator bequeathed a legacy of £10,000 to plaintiff, provided he acted as trustee of his will, and in default of his so acting, this legacy was to fall into his residuary estate. By codicil, dated December 6th, 1899, testator revoked this legacy, and in lieu thereof gave plaintiff £8000, subject to the same condition and gift over as contained in the will. By second codicil he confirmed the first, and by third codicil, dated February 24th, 1904, he provided as follows:—"Whereas by my will, dated, etc., I bequeathed to my nephew, Anthony Browne" (plaintiff), "the sum of £10,000, provided he acted as trustee of my said will, now I absolutely revoke said bequest, and in all other respects I hereby ratify and confirm my said will."

Testator died in 1904, and probate was granted in same year to two of the trustees and executors named in the will, but plaintiff was abroad and stated that he was not aware of testator's death till 1911, when he expressed himself ready and willing to act as trustee of the will, and came back to Ireland and called for a transfer of the trust property to himself and the other trustees. There had been advances of money made by testator to plaintiff on foot of the legacy of £8000 in 1900 and 1901.

Held, (1) that there had been sufficient compliance by the legatee with the condition; (2) that the third codicil did not operate as a revocation of the first codicil, and that plaintiff was entitled to the legacy of £8000 given to him by the first codicil, after giving credit for money paid to him in advance in respect of said legacy.

ADJOURNED SUMMONS.

By his will dated October 21st, 1899, the testator, Anthony Browne, after the appointment of executors and trustees (of whom the plaintiff, Anthony Browne, junior, was one), provided as follows:—"I give to my nephew, the said Anthony Browne, a sum of £10,000, provided he acts as trustee of this my will, and in default of his so doing, I desire said sum shall form part of my residuary estate." He made a codicil to his will, dated December 6th, 1899, in these terms:—"And whereas I have given by my said will to my said nephew, Anthony Browne, the sum of £10,000, now I hereby absolutely revoke said gift, and, in lieu thereof, I give him the sum of £8000, to be subject to the condition that said Anthony Browne shall act as trustee of my said will, and in default of his doing so, I desire that same shall form part of my residuary estate, and in all other respects I confirm my said will." The testator executed a second codicil, dated February 28th, 1901, confirming the first codicil. By a third codicil, dated February 24th, 1904, he provided as follows:—"Whereas by my will, dated 21st day of October, 1899, I bequeathed to my nephew, Anthony Browne, the sum of £10,000, provided he acted as trustee of my said will, Now I absolutely revoke said bequest, and in all other respects I hereby ratify and confirm my said will."

Testator died on February 29th, 1904. Probate of the will and three codicils was granted to two of the executors and trustees of the will on May 6th, 1904. The plaintiff, Anthony Browne, lived in California, and did not (as he stated) hear of testator's death until March, 1911, when he came to England, and in the following July for the first time became acquainted with the terms of the will. He was then ready and willing to act as trustee, and so stated in letters written in September and October, 1911, and he called for a transfer of the trust property to himself and the other trustees.

After the date of the first codicil (in July, 1900, and March, 1901), testator advanced stock and certain shares to the plaintiff, Anthony Browne, of the value altogether of over £5700, on account of the legacy of £8000, and by deed poll of

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May 21st, 1901, plaintiff acknowledged same and empowered the personal representatives of testator (when raised) to deduct the value of same from the amount of his legacy.

A summons was issued by the plaintiff, to determine the question "whether on the true construction of said will and codicils, and in the events that have happened, plaintiff is entitled to said legacy of £8000, or any part thereof."

Herbert Wilson, K.C. (with him, *Sealy*), for plaintiff:—

As to period allowed for performance of a condition: Jarman (1910 ed.), vol. ii., p. 1478. As to acting as executor, see Jarman, vol. ii., p. 1626. An executor may prove at any time: *Read* v. *Devaynes* (1). In *Angermann* v. *Ford* (2), an executor proved after six years, and only in order to take a legacy. As to what is sufficient assumption of the office of executor: Williams on Executors (1905 ed.), vol. i., p. 1080. *Lewis* v. *Mathews* (3) is the strongest case on this point. There is no real difference between acting as executor and acting as trustee. As long as the estate is not fully administered, a legatee can come in and perform the condition. He has fully signified his intention of acting as trustee.

Denis Henry, K.C., and *McGonigal, K.C.* (with them, *R. D. Murray*), for defendants:—

The will shows a clear intention that plaintiff should receive no benefit unless he complies with the condition. Where testator by a codicil confirms his will, the will, together with all previous codicils, is taken to be confirmed: *Green* v. *Tribe* (4). In the last codicil, testator was dealing with the legacy which he had already given to the plaintiff by his first codicil, but he made a mistake as to the mere *quantum* of the legacy. The construction contended for by the plaintiff gives no effect to the last codicil, because the legacy of £10,000 had already been revoked. [They referred to *Lord Carrington* v. *Payne* (5); *Pilcher* v. *Hole* (6); *Re Freme's Contract* (7).] A meaning must be given to the last

(1) 2 Cox, 285.
(2) 29 Beav. 349.
(3) L. R. 8 Eq. 277.
(4) 9 Ch. D. 231.
(5) 5 Ves. 404, 421, 422.
(6) 7 Simon, 208.
(7) [1895] 2 Ch. 778.

codicil if possible. This case is not nearly so strong as *Pilcher* v. *Hole* (1). Here the two sums given are of the same kind—in that case they were capital and income.

Sealy, in reply :—The last codicil does not refer to any other codicil, but only to the will. There is a definite object for the third codicil to refer to. It is impossible to read a reference to the £10,000 given by the will as if it were one to the £8000 given by the first codicil.

BARTON, J.:—

The testator, Anthony Browne, by his will, dated October 21st, 1899, bequeathed a legacy of £10,000 to plaintiff, provided he acted as trustee of his will, and, in default of his so acting, said sum was to form part of his residuary estate. [Reads clause of will.] By codicil dated December 6th, 1899, he revoked this legacy in the following terms: [Reads terms of codicil.] It will be observed that the testator by this codicil in all other respects confirms his will. By a second codicil, dated 28th February, 1901, which does not otherwise affect the present case, he expressly confirmed his will and the first codicil. By a third codicil, dated 24th February, 1904 (five days before his death), he provided as follows : [Reads codicil.] He died 29th February, 1904, and probate was granted to defendants on 6th May, 1904.

It is contended by the plaintiff that he is entitled to the legacy of £8000, given to him by the first codicil, after giving credit for money paid to him in advance of said legacy in July, 1900, and March, 1901. On the other side, it is contended—(1) that plaintiff has not complied with the condition imposed by the will; and (2) that the effect of the third codicil was to revoke the legacy of £8000 contained in the first codicil.

The first point was not pressed very seriously. I am of opinion that there was sufficient compliance with the condition; and I pass to the second question, which is by no means so clear.

Mr. Henry rested his argument for the defendant on *Green* v. *Tribe* (2). That case was reported on another point, in the *Law Journal* reports (47 L.J. Ch. N.S. 783), as to which it has not been

(1) 7 Simon. 208. (2) 9 Ch. D. 231.

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followed in subsequent cases, but upon the point for which it was cited in this case, it is a case of authority, and has been recognized and applied both in England and Ireland, *e.g.*, in *Follett* v. *Pettman* (1); *Stretton* v. *Fitzgerald* (2); *French* v. *Hoey* (3).

It occurs to me that *Green* v. *Tribe* (4), instead of supporting the argument of the residuary legatee, is, when properly understood, an authority the other way. That case decided that a reference, in a later of several codicils, to a will, as of its original date, did not effect a revocation of an intermediate codicil, upon the principle that a clear disposition is not to be revoked except by clear words.

It is of course well settled that the word "will," even when identified by its original date, may be construed as comprising the aggregate of a testator's testamentary intentions manifested in duly executed testamentary instruments, and in this sense it includes "codicil." But it does not necessarily do so for all purposes of construction. It is not a hard and fast rule, but a flexible one, and is not to be applied to defeat the testator's expressed intention. The term "will," especially when accompanied by a reference to its date, may be used in opposition and in contrast to the word "codicil," or at all events in a sense which does not include "codicil." It is a question of expressed intention.

In the present case the reference in the third codicil to "my will," if the words are construed according to their ordinary meaning, is a reference to the original will, as distinguished from its supplementary codicils, because it identifies the legacy as one of £10,000, while the legacy in the codicil was one of £8000. Perhaps the testator was afraid that the confirmation of the will, in the second codicil, may have set up the original bequest of £10,000 in addition to the substituted bequest of £8000. It is impossible to say what notion was in his mind. What he was at is a matter of speculation. What he says is clear and unmistakable; and the Court should not depart from it. He was referring to a described instrument

(1) 23 Ch. D. 337.
(2) 23 L. R. I. 310, 317.
(3) [1899] 2 I. R. 472, 483.
(4) 9 Ch. D. 231.

of a certain date, not to a will in the larger sense of an aggregate of will and codicils. The observations of the learned Judge who decided *Gordon* v. *Lord Reay* (1), which might seem at first sight to aid the argument for the defendants, were dissented from by Sir G. Jessel, in *Burton* v. *Newbery* (2), and by Andrews, J., in *French* v. *Hoey* (3).

There was some force in the argument, which was founded on the suggestion that, if the third codicil does not revoke the gift in the first codicil, it is inoperative, because the gift in the will was already revoked. On the other hand, the testator was, in any view of the case, labouring under some misapprehension or forgetfulness. Under these circumstances we can do no better than fall back upon the safe and sound principle that a clear legacy must not be revoked except by clear words.

Solicitors for the plaintiff: *Maxwell, Weldon, & Co.*
Solicitor for the defendants: *Hugh Kenneay.*

R. W. L.

(1) 5 Sim. 274.
(2) 1 Ch. D. 234, 241.
(3) [1899] 2 Ir. 472, 482.

Appeal.
1912.

McENEANEY *v.* SHEVLIN.

Jan. 23.

Assignment of chose in action—Deposit receipt—Transfer of beneficial interest in—Judicature (Ireland) Act, 1877 (40 & 41 *Vict. c.* 57), *sect.* 28 (6).

In order to transfer the beneficial interest in a deposit receipt, a written assignment is unnecessary. It is sufficient if the deposit receipt is surrendered to the bank, and a new deposit receipt taken out, with intent to pass the beneficial interest, in the names of the persons to whom the depositor intends to pass the beneficial interest.

S., the owner of a deposit receipt for £900, surrendered the same to the bank, and directed a new deposit receipt to be made out in the names of himself and his two nephews, with the intention that the interest in the same should at his own death pass to his nephews. S. subsequently died.

Held, affirming the decision of Ross, J., *ante*, p. 32, that there had been an effectual transfer of the beneficial interest, and that at the death of A. the same passed to the two nephews.

APPEAL by the plaintiff from the judgment of Ross, J., dismissing the action with costs. The trial of the action is reported *ante*, p. 32.

Chaytor, K.C., and *Calvert* (with them *S. L. Brown, K.C.*), for the appellant.

Serjeant Moriarty, K.C., *T. M. Healy, K.C.*, and *Vincent Rice*, for the respondents.

The Court (the Lord Chancellor and Lords Justices Holmes and Cherry) dismissed the appeal with costs.

Solicitor for the appellant: *A. A. Wells.*
Solicitor for the respondents: *P. T. Kerley.*

W. G.

PLATT *v.* CASEY'S DROGHEDA BREWERY COMPANY.

Barton, J.
1911.
Oct. 30.
Nov. 9.

Payment out — Mistake — Recoupment — Order to bring back into Court moneys overpaid.

In a debenture-holder's action, brought by trustees for debenture-holders against an insolvent company, the realized assets were insufficient to pay debenture-holders in full. The allocation schedule was, by mistake, framed on the basis that certain banking companies, who held debentures as security for advances made by them to the company, should receive dividends on the amounts of the debts due to them, instead of on the face value of their debentures. As a result, the amount allocated to the banking companies was less than it should have been, and certain debenture-holders, directors of the company and parties to the action, were consequently overpaid. Upon motion by the plaintiff, who had carriage of the suit, the directors were ordered to bring back into Court the amounts by which they had been overpaid.

MOTION ON NOTICE.

Casey's Drogheda Brewery Company was a company carrying on the business of brewers at Drogheda. The directors of the Company (in accordance with the articles of association) issued debentures for £25,000 divided into 250 debentures of £100 each. The debentures were secured by a trust deed dated 11th March, 1895, of which the plaintiffs were the trustees for the debenture-holders.

The Company had a current account with the Munster and Leinster Bank, Limited, and fifty-seven of the debentures were issued to the Munster and Leinster Bank, to be held as security for the repayment to the Bank of any money then due or thereafter to become due by the Company to the Bank. In like manner 125 debentures were issued to Lloyd's Bank (Limited), as security for advances, and the remaining debentures were issued to other persons for cash at the face value of each debenture.

As the Company was doing badly, an action was commenced in 1906 by the plaintiffs, as trustees for the debenture-holders, against the Company for the realization of the debentures.

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On 1st December, 1906, an order was made directing the realization of the assets of the Company by the receiver, and declaring that plaintiffs as trustees for the debenture-holders were entitled to a first charge upon the property of the defendant Company mentioned in the order. The assets were realized; and by his certificate, dated 18th March, 1910, the chief clerk found that the debenture-holders were entitled to the amount due to each of them respectively, and by order of 13th May, 1910, made on further consideration, the certificate was confirmed; and on 20th December, 1910, an order was made allocating the funds in Court, and declaring a dividend on the amount found due to each debenture-holder. The allocation schedule was framed on the basis that the Banking Companies were to be paid a dividend upon the amount of the debts due to them respectively by the Company. Some little time after the allocation the solicitor for the Munster and Leinster Bank pointed out that the allocation schedule was framed on a wrong basis, and that they were entitled to be paid a dividend upon the face value of their debentures so long as they did not receive more than 20*s.* in the £. The allocation schedule proposed to pay to the Munster and Leinster Bank dividends on £2072 13*s.* 6*d.* (the amount of the debt actually due to them), instead of on £5700, the nominal value of their debentures. Four of the directors of the Company, who were debenture-holders, had taken up their dividend warrants, and had, as a result of the above mistake, been considerably overpaid. But the remainder of the drafts (except in the case of Lloyd's Bank) were still in the hands of the Accountant-General. On 29th June, 1911, the plaintiffs, who were the trustees for the debenture-holders, and had carriage of the suit, served notice that they would apply for an order that the four directors who, as debenture-holders, had taken up their drafts should bring in and lodge in Court the amounts respectively overpaid to each of them, being the difference between the amount which should have been paid to them on allocation had the same proceeded on the basis of paying to the Munster and Leinster Bank, Limited, and Lloyd's Bank, Limited, a dividend on the face value of the debentures held by them in the defendant Company, and the amount which they actually received, the said dividend having been paid on the

basis of the Munster and Leinster Bank, and Lloyd's Bank, receiving a dividend on the amounts found due to them respectively, and that the order of the 20th December, 1910, directing the Accountant-General to make the payments directed in the schedules thereto, be discharged, and that in lieu thereof it be referred to the chief clerk to allocate the funds now in Court, and the funds to be lodged in pursuance of the order to be made hereon amongst the several debenture-holders on the basis of the face value of their debentures.

Serjeant Molony, K.C., for the plaintiffs :—

Each debenture-holder is entitled to dividend on the nominal or face value of his debenture, and not on the amount actually owing to him: Halsbury, vol. v. 530; *In re Driffield Gas Light Company* (1).

Owing to a slip or a mistaken interpretation of the order, the allocation of dividends has been made on a wrong basis, and the four debenture-holders in question have been overpaid, and the Banks have been underpaid. These debenture-holders are bound to bring back into Court anything paid to them in excess of what they should have received.

As to the rights of the parties, see *In re Regent's Canal Ironworks Company* (2), and the observations of Baggallay, L.J., at p. 48: and *Robinson* v. *Montgomeryshire Brewery Company* (3).

In *Dangar's Trusts* (4), where an erroneous order was made owing to the negligence of a solicitor, he was held personally responsible for consequent loss of income to a legatee who had been underpaid; but in *Todd* v. *Studholme* (5), it was clearly decided that recourse must be first had to creditors who had been overpaid in order to recoup those who have not received their full share, on the ground that their fund had been paid away: see page 334 of the report. To set matters right it is not necessary to bring an independent action, for a mistake of this kind can be set right by the Court on motion of this kind. This is not the case of a mistake of law which cannot be rectified,

(1) [1898] 1 Ch. 451.
(2) 3 Ch. D. 43.
(3) [1896] 2 Ch. 841.
(4) 41 Ch. D. 178.
(5) 3 K. & J. 324.

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All the facts were before the Court, but when the fund came to be allocated there was a mistake in the allocation, but the allocation is no bar to relief being given: *Harrison* v. *Kirk* (1), reported as *Beattie* v. *Cordner* (2) in the Irish Appeal and Rolls Court.

Serjeant Matheson, K.C., for the four debenture-holders:—

The four debenture-holders are not bound to bring back and lodge in Court any part of the money which they have received.

If there was any error in the allocation, it was a mistake of law, and money paid under a mistake of law cannot be recovered back if there is nothing against conscience or inequitable in the other retaining it: Roscoe, p. 611; *Lucas* v. *Worswick* (3); Kerr on Fraud and Mistake, p. 471. Nothing inequitable or against conscience exists in this case. The four debenture-holders have only been paid dividends on the amounts actually due to each of them respectively. As to the creation and deposit of debentures as security with a bank, see *Re Strand Music Hall Company* (4) and *In re Anglo-Danubian Steam Navigation and Colliery Co.* (5).

The allocation is a bar. All the facts were known. No objection was taken to the chief clerk's certificate, and the attention of the Court was not directed to the point. The Court cannot make the order asked for. *Harrison* v. *Kirk* (1) is a very different case. There no claim was made against the personal estate (a fund in Court), in the first instance, because the mortgagees of the realty believed the realty to be sufficient security. Here the facts were all known and undisputed from the very beginning. This is not the case of a fund being distributed in his absence or without knowing how things stand.

If any right now exists against the four debenture-holders, it must be enforced by separate action.

(1) [1904] App. Cas. 1.
(2) [1903] 1 Ir. 1, 10.
(3) 1 M. & Rob. 293.
(4) 3 De G. J. & S. 147.
(5) L. R. 20 Eq. 339.

T. S. McCann, K.C., for the Munster and Leinster Bank :—

The Munster and Leinster Bank have received less than they are entitled to get. Part of their property has been paid away. They are entitled to be recouped. Those who have taken the money are the very directors who issued the debentures and who knew that the Munster and Leinster Bank had fifty-seven debentures, and knew also that the amount secured was less than the face value of those debentures. It is not necessary to bring an action. It is not a mistake of law, of such a kind as cannot be rectified: Snell's Equity, p. 433: *Rogers* v. *Ingham* (1); *Allcard* v. *Walker* (2): Kerr on Fraud, p. 465.

[The following cases were also referred to: *Standish* v. *Ross* (3); *Stone* v. *Godfrey* (4).]

BARTON, J.:—

This is a debenture-holder's action. The plaintiffs are the trustees for the debenture-holders, who include, *inter alios*, four directors and two banking companies. The banks hold their debentures as security for advances made to the defendant Company. Their respective debts for principal and interest amount to less than the face value of the debentures which they hold as security. That being so, they are entitled, in the event which has happened of the insolvency of the company, to receive a dividend upon the basis of the face value of their debentures, so long as they do not receive more than 20*s.* in the £ on their debt.

The four directors were privy to the negotiations, as a result of which advances were made by the banks, and they were parties to the issue of the debentures to the banks as security. They were guarantors of some of the bank debts. They have entered appearances in this action, and obtained liberty to attend at Chambers. They have been represented by a solicitor, and, when necessary, by counsel, throughout the proceedings. Their solicitor was awarded costs. A considerable sum for his costs

(1) 3 Ch. D. 351.
(2) [1896] 2 Ch. 369.
(3) 3 Ex. Rep. 527.
(4) 4 D. M. & G., at p. 90.

Barton, J. 1911.

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is one of the items in the allocation schedule, which is the subject of this application.

The banks sent in claims, showing the amount of their respective debts, and the number of debentures held by them as security. Their claims afforded sufficient materials to enable the parties responsible for the allocation to frame a proper allocation schedule. The allocation schedule was, however, framed on the mistaken basis that the banks were to be paid a dividend on their debt, instead of on the face value of their debentures. The result was, that a less sum was ordered to be paid to the banks, and consequently a larger sum to the other debenture-holders, than those parties were respectively entitled to receive.

The allocation order was made in December, 1910. The form of the payment schedule had been submitted to, and had been approved by, the directors' legal advisers. The banks had not entered appearances, and had no notice of the allocation. As soon as they heard of the basis on which the allocation had been made, they protested. The plaintiffs, without any undue delay, instituted this motion for an order upon the four directors to bring in and lodge in Court the differences between the amounts which they had respectively received and the amounts which they should have received. The mistake is admitted. The directors are solvent. The only question is whether the Court can or ought, upon this motion, to correct that mistake.

Let us consider the real effect and meaning of what has occurred. The plaintiffs are trustees for debenture-holders, and are distributing trust funds under the order of the Court. Their *cestuis que trust* include, *inter alios*, these directors, and these two banks. The trustees have by mistake made an over-payment to some *cestuis que trust* of money which rightly belonged to others. I think it is clear that the banks could under these circumstances maintain an action for recoupment against the directors. But it has been contended that the trustees could not maintain such an action, and that they are, therefore, not entitled to succeed upon this motion. In *Harris* v. *Harris* (No. 2) (1) a mistake was made

(1) 29 Beav. 110.

of the same kind as in the present case. Trustees of a settlement, instead of transferring to the husband £5,000 consols, as the settlement directed, raised and paid to him £5,000 sterling, and thus, by mistake, overpaid him a considerable sum. The Court ordered the money to be repaid, at the instance of a party interested under the settlement. It seems to have been assumed in the argument, and in the judgment, that the money could have been recovered through the instrumentality of the trustees.

I am of opinion that the trustees are entitled to maintain this motion. There is no necessity for bringing another action, because the directors have entered appearances in this action. To put the parties to a separate action would conflict with the letter and spirit of the Judicature Act.

The allocation order is no bar. The time for moving to discharge it can, if necessary, be extended.

Solicitors for the plaintiffs: *Thomas Gerrard & Co.*
Solicitor for the debenture-holders: *P. Tallan.*
Solicitors for Munster and Leinster Bank: *Maxwell & Co.*

R. W. L.

H. L.
1912.

Jan. 16, 17.

IN RE BLENNERHASSETT'S ESTATE.

Practice—House of Lords—Appeal—Competency—Distribution of purchase-money—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-sect.* (13).

APPEAL by the Scottish Widows' Fund Life Assurance Society from the order of the Court of Appeal, dated the 2nd November, 1910, affirming the order of Ross, J., dated the 6th July, 1910: see [1911] 1 I.R. 16, where the case is reported.

Ronan, *K.C.* (with him *Macrory*), for the respondent, raised the objection that the appeal did not lie.

Jellett, *K.C.*, and *Garrett Walker*, *K.C.* (with whom was *John E. Walsh*), for the appellants, were heard *contra*.

The House of Lords (EARL LOREBURN, C., EARL OF HALSBURY, LORD ATKINSON, and VISCOUNT HALDANE) dismissed the appeal as incompetent (1).

Solicitors for the appellants: *Freshfields*, for *Whitney & Moore*.
Solicitors for the respondent: *Witham*, *Rosskell*, *Munster & Weld*, for *F. & C. Downing*.

(1) [1912] A. C. 281.

IRISH SOCIETY *v.* FLEMING.

H. L.
1912.

Jan. 17, 18, 24.

Salmon fishing — Drift-nets — Legality of — Nuisance — "Fixed engines" — Fisheries (Ireland) Acts, 1850 and 1863 (13 & 14 Vict. c. 88, s. 1; 26 & 27 Vict. c. 114, s. 4).

APPEAL by the plaintiffs from the judgment of the Court of Appeal, dated the 27th February, 1911, affirming the judgment of the Master of the Rolls, dated the 14th May, 1910, dismissing the action: see [1911] 1 I.R. 323, 353.

Sir Robert Finlay, K.C. (of the English Bar), and *Ronan, K.C.* (with them *D. S. Henry, K.C.*, and *Overend*), for the appellants.

Gordon, K.C., A. M. Sullivan, K.C., and *Gerald Dougherty*, for the respondents, were not called on.

The House of Lords (EARL LOREBURN, C., EARL OF HALSBURY, VISCOUNT HALDANE, and LORD ATKINSON) affirmed the judgment of the Court of Appeal and dismissed the appeal with costs (1).

Solicitor for the appellants: *Leonard Maton*, for *B. H. Lane & Co.*

Solicitors for the respondents: *C. Russell & Co.*, for *J. E. O'Doherty.*

(1) [1912] A. C. 287.

Barton, J.
1911.
June 21.
July 6, 7.

In re GEORGE KNOX, Deceased; VON SCHEFFLER *v.* SHULDHAM and OTHERS.

Will—Construction—Conditions as to naturalization—Impossible condition—Condition subsequent—Disentailing assurance—Effect of, on subsequent limitations.

A testator devised his real estate to A (a German subject) and the heirs of his body, on the express condition that he should within two years from the date of testator's death become a British subject, and take upon himself the testator's name, and should not afterwards divest himself of his status as a British subject, or of such name; the testator further provided that if A refused or neglected to comply with the said conditions, his said real estate should go (subject and upon the same conditions) to A's sister (who was also a German subject) and the heirs of her body, with similar remainders over. On the testator's death A executed a disentailing assurance of the lands.

Held (1) that notwithstanding the provisions of the Naturalization Act, 1870, requiring five years' residence as a condition of naturalization, the condition as to naturalization was not an impossible condition, as it was not impossible to obtain a private Naturalization Act within two years from the date of testator's death; but (2) that the conditions as to naturalization and taking testator's name were conditions subsequent; and that the effect of the disentailing assurance executed by A was to defeat subsequent estates, which would have otherwise taken effect after the determination of, or in defeasance of, the estate tail devised to A; and (3) that A was, accordingly, entitled to an estate in fee simple in the lands freed from the conditions.

This was an originating summons, brought for the determination of a number of questions and matters arising under the will, dated the 25th July, 1907, of Colonel George Knox, of Prehen, in the county of Londonderry; but the case is reported only on the one question, whether, upon the true construction of the said will and in the events which had happened, the plaintiff was entitled to an estate in fee in the real estate devised by the said will, freed from all or any, and if so, which, of the conditions mentioned in the said will.

The material portions of the will were as follows:—"I devise all my real estate, including rents in arrear at my death (subject to the incumbrances affecting the same), unto my grandson,

George Carle Otto Louis Von Scheffler, and the heirs of his body; but upon these express conditions: that he shall within two years from the date of my death become a British subject, and take upon himself the surname of Knox, together with his own family surname, and shall not divest himself thereafter of his *status* as a British subject, or of the name of Knox. If my said grandson refuse or neglect to comply with the foregoing conditions, I devise all my said real estate, with the rents in arrear (subject and upon the conditions aforesaid), to my granddaughter, his eldest sister, Manon, and the heirs of her body. If she refuse or neglect to comply with the foregoing conditions, I devise all my said real estate, with the rents in arrear (subject and upon the conditions aforesaid), to my granddaughter, her sister Virginie, and the heirs of her body. If she refuse or neglect to comply with the foregoing conditions, I devise all my said real estate, with the rents in arrear (subject as aforesaid, and upon the condition of her taking the name of Knox), to my daughter, Augusta Georgina Shuldham, for the term of her natural life, but no longer. If she refuse or neglect to comply with that condition, or in the event of her death if she became tenant for life, all my real estate with the rents in arrear (subject as aforesaid) is to go to whoever at that time is my heir according to the law of descent. Provided always that the person shall be bound to comply with the conditions of British naturalization and the adoption of the name of Knox. And in default of such compliance all my real estate (subject as aforesaid) is to go to the person next entitled by the law of descent, and who shall so comply."

The testator died on the 20th November, 1910; the said will was duly proved by the defendant, Virginie Von Scheffler, the executrix therein named.

The plaintiff and his two sisters Manon and Virginie Von Scheffler were the children of a German subject, and were born and domiciled in Germany; the plaintiff holding a commission in the Royal Prussian Grenadier Guards. The defendant, Augusta Georgina Shuldham, was a British subject.

On the 27th February, 1911, the plaintiff executed a disentailing assurance of the real estate devised to him by the said will.

Barton, J. 1911.

VON SCHEFFLER v. SHULDHAM.

Jellett, K.C., and *Chadwick*, for the plaintiff:—

1. We contend that the plaintiff is entitled to a fee-simple estate, unfettered by any of the conditions in the will. The condition as to naturalization is clearly a condition subsequent, and it is one impossible of fulfilment, as under the provisions of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), residence for five years in this country would be necessary; accordingly the estate becomes absolute, the condition being disregarded: 2 Blackst. Comm. 156–7; Storey's Eq. Jur. (2nd ed.), p. 893. It may be suggested that an Act of Parliament might be passed, but that possibility does not render the condition one capable of performance by the plaintiff; see judgment of Kekewich, J., in *In re Croxon* (1).

2. In any event, the disentailing assurance executed by plaintiff was effectual under 4 & 5 Wm. 4, c. 92, 312, to bar all estates to take effect after the determination, or in defeasance of the estate limited to the plaintiff by the will: *Doe* v. *Scarborough* (2); *Millbank* v. *Vane* (3); *Cardigan* v. *Curzon Howe* (4).

Leech, K.C., and *Poole*, for the defendant, Augusta Georgina Shuldham.

The conditions as to naturalization, even if conditions subsequent, are not impossible of fulfilment. Naturalization Bills are expressly included in the personal Bills which are provided for by the standing orders of the House of Lords, and there is nothing to prevent the plaintiff from forthwith bringing in such a Bill on petition. In *In re Croxon* (1), Kekewich, J., was dealing with a condition as to a name and arms clause which was clearly impossible, and which Parliament could not deal with on petition, and that can have no application here. We further contend that these conditions are conditions precedent to the vesting of any estate in the successive devisees, and that as the plaintiff has not complied with the conditions, he has taken no estate, and the disentailing deed is accordingly inoperative.

(1) [1904] 1 Ch. 252, at p. 259.
(2) 3 Ad. & Ell. 2.
(3) [1893] 3 Ch. 79.
(4) [1901] 2 Ch. 479.

We admit, however, that if that deed was operative it had the effect contended for by the plaintiff.

Osborne appeared for the defendants, Manon Von Scheffler, and Virginie Scheffler.

Babington, for the defendant, Madame Virginie Von Scheffler.

BARTON, J.:—

July 7.

The principal question is, whether the condition that George Von Scheffler should, within two years of the testator's death, become a British subject, and take the surname of Knox, is a condition precedent, or a condition subsequent. In other words, is the performance of the condition intended to precede the vesting of the estate, or is the non-performance of the condition intended to determine an estate vested from the testator's death? The various clauses of this will have been discussed fully on both sides; but there is less assistance than usual to be gained from the context, or from an examination of that which we are bound to examine—I mean "the whole of the will." I do not attach importance to the word "express." It is a word of emphasis, applicable to, and to be found in connexion with, both classes of conditions. It may be said that, as the testator intended the estate to be divested upon the devisee ceasing to comply with these conditions, it is probable that he did not intend it to be vested until and unless the conditions were complied with. On the other hand, the same words were made the groundwork of an opposite argument; and it was contended that the condition for acquisition and retention of citizenship and name are twin conditions subsequent, it being admitted that the condition for retention occurring in the same sentence is a condition subsequent. Reference was made to the curious provisions by which it is attempted to link the arrears of rent with the land in all the limitations of the will; also to the circumstance, perhaps overlooked by the testator, that the condition imposed upon the two sisters of the plaintiff is, if read literally, to become British subjects, and take the name within the same two years as are allowed to their brother, namely, two years from the death of the testator. I do not,

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however, find much assistance from any of these provisions of the will. Perhaps they point to an inference that the testator himself had confused notions upon the subject. Again, it has been pointed out, on the one hand, that, if there was a condition precedent, the testator has not appointed trustees or provided for the management or enjoyment of his estate during the period before vesting; and it was said, on the other hand, that, in that event, the heir-at-law would, during such an interval, be entitled to take the rents and profits, and is not to be disinherited without clear words or necessary implication. I do not feel called upon to further discuss these topics, from which I fail to derive much help.

There is, however, a general rule of construction, from which some help may be derived. The Court leans to the construction that a condition is subsequent when it involves the doing of something which cannot be done without the expenditure of time and trouble. Lord Mansfield illustrated this rule by reference to the condition of procuring a King's licence to take a name: *Gulliver* v. *Ashby* (1). If the circumstance that compliance with this condition involves time and trouble aids the inference that the testator intended the condition to be subsequent, then the rule laid down by Collins, M.R., in *In re Greenwood* (2) becomes applicable, viz., that in a devise of real estate with a condition, where the intention of the testator, as evidenced by the words he has used, is more consistent with the inference that he intended the condition to be a condition subsequent rather than a condition precedent; then, if the words are capable of admitting both constructions, the Court ought to hold the condition to be a condition subsequent.

The effect of holding the condition to be subsequent has a serious effect upon the devise, because the estate is devised to the plaintiff, and the heirs of his body, and the plaintiff has executed a disentailing deed. The effect of that disposition is settled by section 12 of the Irish Fines and Recoveries Act (4 & 5 Wm. 4, c. 92). It operates as a bar to all persons whose estates are to take effect after the determination, or in defeasance, of the estate tail, saving estates prior to the estate tail. In commenting on the section Lord St. Leonards (Sugden's Real Property Statutes,

(1) 4 Burr. 1929, 1940. (2) [1903] 1 Ch. 749, 755.

2nd Ed., 193) observes—"Therefore, an executory or shifting limitation over after an estate tail, to take effect in defeasance of, and not to await the regular determination of, an estate tail, will be barred." This passage was quoted and applied by Kay, L.J., in *Millbank* v. *Vane* (1). A condition subsequent annexed to an estate tail was always barrable by a common recovery: *Gulliver* v. *Ashby* (2). The result is that, if I am right in holding that this condition is a condition subsequent, the disentailing deed gets rid of it, and the plaintiff is absolutely entitled to the lands in fee freed from any condition.

I must notice another point, although the conclusion at which I have arrived renders it less important than it would otherwise be. It was contended that, because naturalization under the Naturalization Act, 1870, involves five years' residence, this condition is an impossible one. I cannot agree with that contention. Any person may become a British subject within twelve months by petition to Parliament. A Naturalization Bill is a well-recognized way of becoming a British subject; and the standing orders of both the House of Lords and House of Commons provide for naturalization Bills, with name Bills, and other personal Bills of that kind. The petitioner must lodge a certificate of conduct from a Secretary of State, and must otherwise comply with standing orders. In *Doe* d. *Luscombe* v. *Yates* (3) the will contained a provision which contemplated, *inter alia*, the taking of the testator's surname "by Act of Parliament, or some other effectual way for that purpose." Abbott, C.J., at p. 556, observed—"We would not be understood to say that where a testator expressly requires a name to be taken by Act of Parliament or other specified mode, any mode falling short of the specified mode may be substituted for it." Lord Mansfield in *Gulliver* v. *Ashby* (2), at p. 1940, referred to an Act of Parliament as a possible mode of complying with a condition to take a name. I do not think that this was an impossible condition. It may be a difficult and expensive condition to comply with, and one which may be attended by risk of mishap; but it is not, in my opinion, impossible.

(1) [1893] 3 Ch. 79, at p. 91. (2) 4 Burr. 1929, 1941, 1942, 1943.
(3) 5 B. & Ald. 544.

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This case is distinguishable from *In re Croxon* (1), where the condition was to lawfully assume the arms of an old family to which the testator and devisee did not belong. The testator contemplated such a usurpation of arms as could not be countenanced. No such arms could be exemplified by the Heralds' College or College of Arms, or be granted by Royal licence, without strict proof to establish descent from some member of the old family entitled to bear the arms. That was an impossible condition, because the devisee was not descended from any member of the old family, or related to it. In that case Kekewich, J., rejected a suggestion of a petition to Parliament, which neither fitted the language of the gift, nor was in the least degree likely, in the circumstances of the case, to be successful. But here we have to deal with naturalization, for obtaining which a petition to Parliament is a well-recognized procedure, and the only one which is possible within two years.

The position of the plaintiff's sisters is peculiar, because if the devise to them be read literally, they have only the same period of two years from the testator's death as their brother has, within which to comply with the condition. I required them to be separately represented; and having heard counsel for them and for all the parties interested, I have come to the conclusion that their estates are barred by the disentailing deed, and that the plaintiff is now entitled to an estate in fee-simple in the lands freed from the conditions.

Solicitors for the plaintiff: *Colquhoun & King.*

Solicitors for the defendant Augusta Shuldham: *Crookshank, Leech, & Davies.*

Solicitor for the other defendants: *F. D. S. Colquhoun.*

R. W. I.

(1) [1904] 1 Ch. 252, at p. 259.

IN THE MATTER OF THE ESTATE OF CHARLES CHENEVIX TRENCH.

Wylie, J.
1912.
April 23, 25.

Land Purchase Acts—Sale of settled lands—Purchase-money paid to trustees of settlement—Jurisdiction of Land Commission and Land Judge to appoint public trustee subsequently—Irish Land Act, 1903 (7 *Edw.* 7, *c.* 37), *s.* 52

Where settled lands have been sold under the Land Purchase Acts and the purchase-money has been paid out to the trustees of the settlement, a Judicial Commissioner or the Land Judge, as the case may be, has jurisdiction, where the trustees have since died, to appoint the public trustee trustee of the settlement, in relation to the purchase-money of the lands so sold.

APPLICATION by Charles Chenevix Trench, for an order that the public trustee be appointed trustee of the settlement created by the will of the Most Rev. Richard Chenevix Trench, Archbishop of Dublin, deceased, for the purposes of the Settled Land Acts, 1882 to 1890, in relation to the capital moneys representing such portions of the lands thereby settled as had been, or should be, sold under the Land Purchase Acts.

Under the above-mentioned settlement, the said Charles Chenevix Trench became entitled as tenant for life in possession to the lands of Ballinamona, Kilclogher, and New Affan, county Waterford, with remainder to his first and other sons in tail male. In 1889, the Master of the Rolls appointed trustees under the said settlement for the purposes of the Settled Land Act, 1882, the appointment being limited to said lands. Prior to 1908, the said Charles Chenevix Trench sold part of the said lands of New Affan and Ballinamona under the Land Purchase Acts, and the residue of the purchase-money thereof was, in that year, duly paid out to the said trustees. The surviving trustee of said settlement died in 1911.

Agreements had been lodged under the Land Purchase Acts for the sale of the remaining portions of the said lands of New

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Affan and Ballinamona, but the purchase-money had not yet been advanced.

M. G. Longfield, in support of the application :—

The Court has jurisdiction to make the order sought. Under section 52 of the Act of 1903, in all cases where settled funds have their origin under the Land Purchase Acts, the Land Commission has jurisdiction at any subsequent time to appoint the public trustee trustee of the settlement.

April 25.

WYLIE, J. :—

In this case the Master of the Rolls made an order appointing trustees for the purpose of the Settled Land Acts of a will, limited to certain lands thereby settled. Portions of these lands were subsequently sold under the Land Purchase Acts, and the purchase-money was paid out to the trustees. The surviving trustee has since died, and I am now asked to appoint the public trustee trustee of the will.

The powers of the public trustee are limited by statute. Section 52 (1) of the Irish Land Act, 1903, provides that for the purpose of the Land Purchase Acts there shall be a public trustee. He is only brought in for the purpose of the Land Purchase Acts. Once the purchase-money has been paid out, the purposes of the Land Purchase Acts are at an end. Sub-section 10, however, goes on to provide that where any settled land has been purchased by means of an advance under the Land Purchase Acts, and there is no trustee of the settlement, the public trustee may be appointed by the Land Commission to be trustee of the settlement. Now, if there were nothing else, I would be disposed to hold that that sub-section was subject to the limitation in the first sub-section, *i.e.*, for the purpose of the Land Purchase Acts. But sub-section 11 goes on to provide that, where the trustees of any such settlement refuse or neglect to invest the purchase-money in any securities authorized in pursuance of the last preceding section, the tenant for life may apply to the Land Commission to substitute the public trustee for those trustees, and the Land Commission may by order make

such substitution accordingly. It is clear that that sub-section applies to a period after the purchase-money has been paid out, and the trustees refuse or neglect to invest the purchase-money. Then sub-section 12 provides that the trustees of any such settlement may apply to the Land Commission to be discharged from their trust, and that the public trustee be appointed in their place, and the Land Commission, may, if they think fit, make an order accordingly. That sub-section, too, evidently applies to a period after the purchase-money has been paid out. Sub-section 14 also provides that the powers conferred on the Land Commission by the foregoing provisions of the section may be exercised by the Land Judge in any case where the purchase-money of land, sold under the Land Purchase Acts, is distributable or has been distributed by him, clearly showing that the jurisdiction to appoint the public trustee exists after the final distribution of the purchase-money. Then Rule 12 of the Rules of the 5th December, 1904, provides that the Court, when appointing or substituting the public trustee as trustee of a settlement, may limit the scope of the order to the purchase-money of the land sold under the Land Purchase Acts or otherwise, as to the Court shall seem fit.

Both under the Act and Rules, it seems to me to have been intended that the public trustee should only be appointed in relation to the proceeds of sale of lands sold under the Land Purchase Acts. The Court of Chancery is not empowered to appoint the public trustee, as such, a trustee of such a settlement. Although the public trustee may, like any other trustee, make application, under Rule 24, to a Judge of the Chancery Division for his opinion as to a question arising in the administration of the trust, his appointment lies in the first instance with a Judicial Commissioner or the Land Judge; and, under Rule 25, it is to the Land Commission that any application by a party interested as to the administration of the trust by the public trustee is to be made. The Act and Rules appear therefore to me, in cases where the land sold is settled land, and the services of the public trustee are desired, to bring within the purposes of the Land Purchase Acts, and under the jurisdiction of the Land Commission, the complete administration of the trusts affecting the purchase-money.

Wylie, J. 1912. *In re* TRENCH'S ESTATE.

I hold that I have jurisdiction to appoint the public trustee in the present case, and I will make an order accordingly. I have full power to make any consequential order as to vesting afterwards.

Solicitors for Charles Chenevix Trench: *Richardson and Synnott.*

J. E. W.

Wylie, J. 1912.

April 30. May 6.

IN THE MATTER OF THE ESTATE OF JAMES B. DELAP.

Tithe rentcharge—"Person liable to pay"—Merging Order—Irish Church Act, 1869 (32 *&* 33 *Vict. c.* 42), *s.* 32—*Undertaking landlord—Stanley's Act* (2 *&* 3 *Wm.* 4, *c.* 119), *ss.* 17 *and* 24—*Recovery of sum equal to amount of rentcharge from tenant, as rent—Tithe Rentcharge* (*Ireland*) *Act,* 1838 (1 *&* 2 *Vict. c.* 109), *ss.* 7 *and* 10.

A vendor entered into an agreement with a tenant for the sale of his holding under the Land Purchase Acts. In the agreement it was stated that the tenant held at a rent of £54, payable under a fee-farm grant, dated 1837, being the sum of £49 6*s.* 8*d.*, rent reserved by said grant, and £4 13*s.* 4*d.* added to said rent under the provisions of 1 & 2 Vict. c. 109, s. 10. It appeared that the sum of £54 had been paid since the time of said fee-farm grant by the tenant and his predecessors. The tithe rentcharge in respect of the vendor's whole estate, including the tithe rentcharge payable in respect of the lands comprised in said holding, had been paid by the predecessors in title of the vendor up to 1872. In that year the predecessor in title of the vendor, as the person liable to pay the tithe rentcharge, applied to the Commissioners of Church Temporalities to purchase up the tithe rentcharge payable in respect of his whole estate, and to pay the purchase-money by instalments. A merging order was duly made pursuant to s. 32 of 32 & 33 Vict. c. 42, and the instalments were declared charged on the lands. The instalments had since been paid by the vendor and his predecessors in title, and the last would have been paid off a few years hence.

Held, that the facts of the case were consistent only with the view that the predecessor in title of the vendor became an undertaking landlord within s. 17 of 2 & 3 Wm. 4, c. 119, and that, by virtue of the fee-farm grant of 1837, and s. 10 of 1 & 2 Vict. c. 109, the tenant and his predecessors became liable to pay the £4 13*s.* 4*d.* as rent in perpetuity.

QUESTIONS of law submitted by the Estates Commissioners for the opinion of the Judicial Commissioner, under section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—

The vendor entered into an agreement in Form "F," dated the 2nd May, 1908, with Robert McKinlay, for sale of his holding at £1412, and it was, in paragraph 4 thereof, stated that the holding was then held by the tenant at a yearly rent of £54, payable under a fee-farm grant, dated the 31st October, 1837, being the sum of £49 6*s.* 8*d.* rent reserved by said grant, together with the sum of £4 13*s.* 4*d.* added to said rent under the provisions of 1 & 2 Vict. c. 109, s. 10.

The said sum of £1412, the purchase-money of said holding, was arrived at as the result of a bargain between the vendor and the purchaser, that the purchaser was to pay such a price as would represent a reduction of 3*s.* in the £ in his purchase annuity as compared with the annual sum which he was paying his landlord, which included the sum of £4 13*s.* 4*d.* mentioned in the said agreement, both parties to the agreement assuming that the said sum of £4 13*s.* 4*d.* was a perpetual charge.

The vendor held the estate of which said holding formed a part under a fee-farm grant dated the 25th November, 1836, and made between the Bishop of Derry of the first part, the Ecclesiastical Commissioners for Ireland of the second part, and James Bogle Delap of the third part, being a grant under 3 & 4 Wm. 4, entitled "An Act to alter and amend the laws relating to the Temporalities of the Church in Ireland," subject to the fee-farm rent therein mentioned.

By a sub-fee-farm grant, dated the 31st October, 1837, and executed pursuant to 6 & 7 Wm. 4, c. 99, the said James Bogle Delap granted the lands the subject-matter of the said agreement to Samuel Ross, predecessor in title of Robert McKinlay, subject to the fee-farm rent of £49 6*s.* 8*d.*

The tithe composition payable in respect of the lands the subject-matter of the said agreement appeared from the original applotment-book to be the sum of £6 4*s.* 8*d.* Three-fourths

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of this sum was the sum of £4 13*s.* 6*d.*, and this sum became the tithe rentcharge payable in respect of the said lands. The tithe rentcharge in respect of the whole of the vendor's estate, including the tithe rentcharge payable in respect of the said lands the subject-matter of the said agreement, and amounting altogether to the sum of £92 9*s.* 6*d.*, was, so far as was known, always paid by the vendor or his predecessors in title up to the date of the merging order, hereafter referred to.

Under the Irish Church Act, 1869, the tithe rentcharge vested in the Commissioners of Church Temporalities in Ireland, and by section 32 power was given them to sell any such rentcharge to the owner of the lands charged therewith for twenty-two and a half years' purchase, and to merge the tithe. This purchase-money might be payable in cash in one sum, or, under the power given by same section, the purchase-money might be declared to be payable by instalments, and the land to be charged accordingly with an annual sum calculated as therein for fifty-two years.

By order dated the 30th October, 1872, the said tithe rentcharge of £92 9*s.* 6*d.* was merged, and the purchase-money calculated to be the sum of £1977 3*s.* 9*d.*, and the estate of the vendor's predecessor in title was charged with an annual sum of £87 19*s.* 9*d.*, for fifty-two years from the 1st November, 1872, in satisfaction of said purchase-money. The period for which the said instalments were payable was subsequently reduced, by the Act of 1900, to forty-five years.

The instalments had since continued to be paid by the vendor and his predecessors, and at the date of the sale in this matter there remained due about eleven instalments.

The sum of £4 13*s.* 4*d.*, differing only by two pence from the tithe rentcharge payable in respect of the lands the subject-matter of the said agreement, had, so far as was known, always been paid by the purchaser and his predecessors in title to the vendor or his predecessors in title.

The following questions were submitted:—

1. Was the sum of £4 13*s.* 4*d.*, at the date of said agreement, a perpetual charge on the lands the subject-matter of said agreement?

2. Was the predecessor in title of the vendor, or the grantee under the said sub-fee-farm grant, the owner of the responsible estate at the date of said merging order?

3. Was the sum of £4 13*s.* 4*d.* payable by the sub-fee-farm grantee, under section 10 of 1 & 2 Vict. c. 109, along with the rent payable under the sub-fee-farm grant?

A. B. Babington (with him, *Denis Henry, K.C.*), for the vendor:—

Prior to Goulburn's Act (4 Geo. 4, c. 99), the person liable to tithe was the occupier. Under that Act composition for tithes was substituted, which was to be paid by the occupier: see section 38. Stanley's Act (2 & 3 Wm. 4, c. 119) varied the liability to tithe composition. Under s. 17 of that Act, any person having in possession any estate or interest in land charged with the payment of any composition for tithes, such person not being a tenant for any lesser term than a term of twenty-one years, might agree for and undertake the future payment of such composition, in the manner and subject to the regulations contained in the Act. Under section 19 any person so undertaking was entitled to an abatement on the amount of the composition, at the rate of £15 per cent. on such amount. Under section 21 certain notices were to be given by such person, and by section 22 it was provided that he was to be granted a certificate, a counterpart of which was to be duly registered. Under section 24 the person to whom such certificate had been granted was entitled to recover over against the persons liable to tithe composition the full amount of such composition. By the Tithe Rentcharge (Ireland) Act, 1838 (1 & 2 Vict. c. 109), composition for tithes was abolished, and by section 7 of that Act all lands subject to the payment of tithe composition were charged with an annual sum by way of rentcharge, equal to three-fourths of such composition, to be payable by the party having the first estate of inheritance in the lands, or, in the case of an undertaking landlord, by such landlord: provided he had an estate not less than an estate of inheritance. The first estate of inheritance was the first estate above the occupier. If the occupier had a perpetual

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estate, then he was taken to have the first estate of inheritance. By section 10 it was provided that, if any person who would have been liable to tithe composition held mediately or immediately under the person liable to such rentcharge, an annual sum equal to the amount of such rentcharge might be recovered as rent from the next tenant, and so downwards to the person primarily liable. By section 32 of the Irish Church Act, 1869 (32 & 33 Vict. c. 42), the Commissioners of Church Temporalities in Ireland were empowered to sell any rentcharge in lieu of tithes, vested in them under the Act, to the owner defined by the section to be the person for the time being liable to pay rentcharge in lieu of tithes under the Tithe Rentcharge (Ireland) Act, 1838, and by order to declare such rentcharge merged in the lands out of which it issued.

In the present case payment has been made by the landlord, since at least 1837, of tithe composition, and afterwards of tithe rentcharge, for which, *prima facie*, his tenant would have been liable, coupled with payment by the tenant of his proportion, as if under section 24 of Stanley's Act, or section 10 of the Tithe Rentcharge (Ireland) Act, 1838. For these payments the Court, after such a lapse of time, must presume a legal origin. The only way in which the vendor or his predecessors in title could have become legally liable was by becoming undertaking landlords under Stanley's Act. This the Court should presume.

If the predecessor in title of the vendor became an undertaking landlord, he was legally liable to pay the tithe rentcharge, under section 7 of the Tithe Rentcharge (Ireland) Act, 1838, and was the person to whom the Commissioners of Church Temporalities could sell under section 32 of the Irish Church Act. The Court must then decide whether the purchase and merging order enured for the benefit of the tenant. Clearly they did not. If the purchase had been for cash, the tenant could not have claimed the benefit of it, and, where it is a redemption by instalments, it is, in effect, a payment in cash to redeem a perpetuity, and leaves the sum paid by the tenant under section 10 of the Tithe Rentcharge (Ireland) Act, 1838, unredeemed. The "annual sum equal to the amount of the rentcharge," added to the tenant's rent under that section, is not the same as the "annual sum or

rentcharge" charged on the lands by section 7 of the same Act. *In re Bomford's Estate* (1), and *Adnam* v. *Sandwich* (*Earl*) (2), are clear authorities for presuming a legal origin for the unexplained payments in this case.

The Solicitor-General (*Ignatius O'Brien, K.C.*) (with him, *H. Mac Dermot*), for the Treasury :—

Under Stanley's Act a specified procedure had to be adopted by any person undertaking the future payment of tithe composition. The Court is now asked to assume that that procedure was adopted where the documents which would establish the fact, if it were ever adopted, could be found in the Record Office.

Under section 7 of the Tithe Rentcharge (Ireland) Act, 1838, the grantee in the fee-farm grant of the 31st October, 1837, had, at the date of that Act, and his successors in title have since had, the first estate of inheritance in the lands that are being sold, and, as the owner of such first estate, he was liable to the payment of the tithe rentcharge payable in respect of the lands. There has been an order merging the tithe rentcharge, and in a few years the last instalment in lieu of tithe rentcharge will have been paid. If the tithe rentcharge has merged in the lands that were formerly liable, how can it be contended that the landlord is entitled to continue to recover an "annual sum equal to the amount of the rentcharge" perpetually from the tenant? Section 32 of the Irish Church Act enacts that, upon any such sale being so made, the Commissioners shall by order declare the rentcharge to be merged in the land out of which it issued, and the same shall merge and be extinguished accordingly. That cannot mean that the rentcharge shall merge, but that the under estate of inheritance shall be liable perpetually. At most, the annual sum of £4 13*s.* 4*d.* must be deemed to expire at the same time as the annual instalments.

(1) [1904] 1 Ir. R. 474. (2) 2 Q. B. D. 485.

Wylie, J.
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In re
DELAP'S
ESTATE.

May 6.

WYLIE, J.:—

The vendor on the 2nd May, 1908, entered into an agreement with Robert McKinley for the sale of his holding at £1412. The agreement stated that McKinley held at a rent of £54 payable under a fee-farm grant dated the 31st October, 1837, being the sum of £49 6*s.* 8*d.*, rent reserved by said grant, and £4 13*s.* 4*d.* added to said rent under the provisions 1 & 2 Vict. c. 109, s. 10. That statement as to the added rent is signed by both vendor and tenant, and, by reference to the statute, it means in effect this—that the grantor in said fee-farm grant, being the person then liable to pay the tithe rentcharge by virtue of section 7 of said Act, was entitled to recover in perpetuity from the grantee, his heirs and assigns, the sum of £4 13*s.* 4*d.* in like manner as if the said sum had been expressly reserved by the fee-farm grant as rent.

Now, notwithstanding that admitted statement, and the fact that the rent of £54, which included this £4 13*s.* 4*d.*, has been paid since 1838 up to the present, the Estates Commissioners have raised the question as to whether this sum of £4 13*s.* 4*d.* can be treated as rent for the purpose of fixing the price to be paid by the tenant-purchaser for the holding?

Now on what ground is this question raised? First, the Estates Commissioners say that the grantee, having the first estate of inheritance in the lands, was the person liable to pay the tithe rentcharge under section 7. But the proviso to the section shows that that is not so if the grantor was an undertaking landlord within Stanley's Act; and the fact that the tithe rentcharge was added to the rent, and paid by the grantee pursuant to section 10, shows that the grantor was an undertaking landlord. I could understand this point being made by the Estates Commissioners, if the tithe rentcharge had been paid as such by the tenant-purchaser and could remain a charge on the lands notwithstanding the sale. But the tithe rentcharge is no longer a charge on the lands. It was extinguished by a merging order made in October, 1872, and, curiously enough, out of this arises the second ground of objection. Under sect. 32 of the Irish Church Act, 1869, the "Owner" of the lands—

i.e. "the person liable to pay the tithe rentcharge"—was entitled to purchase up the tithe rentcharge at twenty-two and a half years' purchase, and had the option of paying either in cash or by instalments for a period of years charged on the land. The vendor's predecessor in title, as the person liable to pay the tithe rentcharge, made application to the Church Commissioners to purchase it up and pay by instalments, and, accordingly, the merging order was made, and the instalments charged on the land. All the instalments will be paid off in a few years. So the tithe rentcharge was extinguished in 1872, and it is plain that the position of the vendor and the tenant-purchaser in regard to the sum of £4 13*s.* 4*d.* must be the same now as if the vendor had paid cash in 1872. Yet the Estates Commissioners say that the sum of £4 13*s.* 4*d.* should not be paid for by the purchaser as if it were a perpetual charge, but that it should, at most, be treated as expiring at the same time as the annual instalments. It might as well be contended that it should be treated as expiring in 1872, if the vendor, as he might have done, had purchased the rentcharge for cash.

The facts of this case are consistent only with the view, so clearly and ably put forward by Mr. Babington, that the vendor's predecessor in title was an undertaking landlord within Stanley's Act, and that, by virtue of the fee-farm grant of 1837, and section 10 of the Tithe Rentcharge (Ireland) Act, 1838, the tenant and his predecessors became liable to pay this £4 13*s.* 4*d.* as rent in perpetuity.

I, therefore, answer questions 1 and 3, in the affirmative, and question 2, "yes, the predecessor in title of the vendor."

Solicitors for the vendor: *Wilson and Simms.*
Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

Appeal.
1912.

LATHAM *v.* TRAVERS (1).

April 26, 29.
May 7.

Lunatic—Estate—Sale to Estates Commissioners—Fee-farm grant and moiety of reserved rent— Will — Devise — Ademption — Lunacy Regulation (Ireland) Act, 1871, *ss.* 63, 67—*Irish Land Act*, 1903, *s.* 26.

N. devised his share of certain lands to L. These lands were held in fee-farm, and N. was entitled to a moiety of the fee-farm rent as well as to the lands comprised in the grant, the other moiety of the rent being vested in L. In 1905 he lodged an originating request with the Estates Commissioners for the purpose of selling to the tenants.

N. was afterwards found a lunatic by inquisition, and the Estates Commissioners, in the year 1908, sent in a proposal to the committee of the lunatic's estate to purchase the lands for the sum of £5136. This proposal was submitted to the Lord Chancellor, who, on the 18th May, 1908, made an order declaring that the sale was for the benefit of the lunatic, and just and reasonable, that the committee should be at liberty to carry out such sale, and to apply that the net amount available in respect of the purchase-money should be transferred to the credit of the lunacy matter, and separate credit of the sale of the lands. The sale was accordingly carried out, and on the 15th January, 1909, an order was made by the Lord Chancellor in the lunacy matter, giving the committee of the estate liberty to consent to the redemption of L.'s moiety of the fee-farm rent at the sum of £2500, and in pursuance of consent under that order the moiety of the fee-farm rent was redeemed at £2450, paid out of the purchase-money, and the balance was transferred to the credit of the lunacy matter. After the death of N. questions were raised by his heir-at-law and next-of-kin whether the devise of his share in the lands, so far at least as the moiety of the fee-farm rent was included in it, was adeemed by the sale.

Held, affirming the decision of the Master of the Rolls, that the sale having proceeded under section 26 of the Irish Land Act, 1903, section 67 of the Lunacy Regulation (Ireland) Act, 1871, negatived ademption.

Appeals by Mary E. Duffy and by Eugene Robinson, assignee of Julia Travers, by indenture of assignment dated 3rd March, 1911, from so much of the order of the Right Hon. the Master of the Rolls, dated 10th November, 1911, as declared "that the

(1) Before The Lord Chancellor, and Lords Justices Holmes and Cherry.

sale of the lands in the said order referred to, under the circumstances under which the sale took place, did not effect an ademption of the testator's moiety of the fee-farm rent of £224 2*s.* 8*d.*, therein referred to"; see *ante*, p. 140, where the hearing of the case in the Rolls Court and the Master of the Rolls' judgment will be found reported.

In addition to the documents mentioned in the report in the Court below, it is deemed advisable to state that on the 15th January, 1909, an order was made by the Lord Chancellor, that the committee be at liberty to consent to the redemption at the price of £2500 of one moiety of the head-rent of £224 2*s.* 8*d.* payable out of the Meath estate of James Thomas Nugent, and that the committee be at liberty to apply to the Land Commission that the balance of the purchase-money of the estate of the said James Thomas Nugent be invested. By a consent, dated 30th January, 1909, signed by Johanna Latham and Sir Walter Nugent, committee of the lunatic, entitled in the Land Commission matter, reciting that the fee-farm rent originally reserved had been reduced to £224 2*s.* 8*d.*, and that Mrs. Latham was owner of one moiety thereof, and that the vendor, in addition to being owner of the estate in the matter, was owner of the other moiety of the said rent, "and in consequence thereof, it was not necessary to deal with the redemption of the latter moiety," and the finding in lunacy, and appointment of the committee, and reciting the Lord Chancellor's order of the 15th January, 1909, it was thereby consented and agreed that an order should be made in the matter for the redemption of Mrs. Latham's moiety of the rent, and that the redemption price thereof be fixed at £2450. No order of the nature of that dated 15th January, 1910, mentioned *ante*, p. 143, was produced at the hearing of the appeal. But on the allocation schedule, after rulings as to Mrs. Latham's moiety of the rent, there appears the following:—"Fix redemption price of other moiety of rent at £2450, transfer said sum to the separate credit of the moiety of said rent payable to vendor, and place same on D. R.—J. O. W., 15*th Feb.*, 1909."

The lunatic died on the 28th December, 1909, and probate of his will was granted to Mrs. Latham, as executrix, on the 9th February, 1910.

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S. L. Brown, K.C. (with him, *M'Cann, K.C.*, and *Macrory*), for the appellant, Mary E. Duffy :—

Prior to the Lunacy Regulation Act, 1871, the Lord Chancellor had power to sell the estate of a lunatic, but the jurisdiction was exercised very rarely and only when it was necessary to do so for the personal benefit of the lunatic. The reason was, first, that if the lunatic recovered, he should find his property, as far as possible, in the same condition it was in when he became insane ; secondly, to preserve if possible the rights of devisees under a will made when he was sane. By section 63 of the Act of 1871, power is expressly given to the Lord Chancellor to sell any estate or interest of a lunatic in land, where it appears to the Lord Chancellor to be just and reasonable, or for the lunatic's benefit, for the purpose of raising money to be applied for seven specified purposes. [Counsel read the section.] The principle upon which the tribunal having jurisdiction in lunacy (in England, the Lords Justices) acts in dealing with the property of lunatics was very fully and clearly stated by the House of Lords in *The Attorney-General* v. *Marquis of Ailesbury* (1). [Counsel read from the judgment of Lord Macnaghten, p. 688.] Section 63 of the Act of 1871 extends the power which the Lord Chancellor antecedently possessed ; section 67 provides that the surplus of the proceeds of any sale shall belong to the person who on the death of the lunatic would have been entitled to the lands if unsold. Sect. 26 of the Irish Land Act, 1903, gave additional powers of sale to the Lord Chancellor by enacting that where a person who would otherwise be entitled to sell land under the Land Purchase Acts is a lunatic the Lord Chancellor may order the land to be sold as if the sale was required for one of the purposes mentioned in section 63 of the Lunacy Act, 1871, and that section shall apply accordingly. That section does not apply to the sale or redemption of a head rent. The person having power to sell under the Land Purchase Acts is defined by section 17 of the Act of 1903. The word "land" has a special signification in section 26. The wording of the section is practically conclusive. Throughout the whole Land Purchase Code, a distinction is taken between

(1) 12 A. C. 672.

"land" and "superior interest": see sections 17 and 62 of the Act of 1903, section 16 of the Act of 1887, and section 33 of the Act of 1896. Superior interests may be sold voluntarily, independently of the Land Purchase Acts; but if so, they remain existing interests. On the other hand, superior interests compulsorily redeemed in proceedings under the Land Purchase Acts are not sold, but are extinguished. In *In re Close's Estate* (1), the Lord Chief Baron, speaking of the mode of valuing these superior interests, says: "In my opinion, the subject-matter to be valued is the superior interest, that is the estate in the land sold of which the appellants were seised at the moment of the sale."

In a case of this kind there is no purchase of the superior interest; therefore there is an ademption of the devise at least so far as the superior interest is concerned, because there is nothing in existence to answer the devise.

But even if the word "land" in section 26 could include such an interest as the moiety of the fee-farm rent, the only operation of section 26 is to attract section 63, and not section 67, of the Lunacy Act, 1871. Section 63 of that Act is the only section mentioned in section 26 of the Land Act, 1903; and section 26 concludes by saying, "that section"—*i.e.*, section 63—"shall apply accordingly."

Ronan, K.C., H. Wilson, K.C.,* and *The Hon. C. T. Atkinson for Mrs. Latham:—

If the lunatic had been entitled to the whole of the fee-farm rent, he would have been owner in fee-simple. The basis of the Lord Chancellor's order of the 18th May, 1908, was that the lunatic was owner of the land, subject only to the moiety of the fee-farm rent vested in Mrs. Latham. In *The Attorney-General* v. *Marquis of Ailesbury* (2), Lord Macnaghten, at p. 688, summing up the result of the views expressed by four Lord Chancellors, says that "it is the duty of the Court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession." The sale here was certainly outside the ordinary course of management of the lunatic's estate, and Lord Macnaghten's words expressly apply. That being the rule

(1) [1905] 1 I. R. 371, at p. 381. (2) 12 A. C. 672.

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prevailing in England, the English Lunacy Regulation Act, 1853, was passed, section 116 of which is identical with section 63 of the Irish Act of 1871. The effect of that section in defining, and to some extent limiting, the original jurisdiction in lunacy was considered in *In re Corbett* (1). Lord Chelmsford says, p. 517: "The power"—*i.e.*, of selling land to the particular case—"must now be governed by the Lunacy Regulation Act, 16 & 17 Vict. c. 70. That Act extends and defines the powers of the Court, and the Court must confine itself within the limits defined. . . . I am bound by the terms of the 116th section, beyond which I cannot go."

Therefore, the general power of the Lord Chancellor to order a sale was withdrawn, and he can only act under the statute; and it is impossible to have a sale under the Act which will effect a change in the devolution of the property. The definition of "land" in the Act of 1871 is the same as that in the English Act of 1853. Section 10 of the Purchase Act, 1885, incorporated sections 68 and 69 of the Landed Estates Court Act, dealing with the redemption by agreement of what is called superior interests in the Act of 1896. [Counsel also referred to the second clause of section 13 of the Act of 1885 and section 31 of the Land Law Act, 1896, and read the order of the Lord Chancellor, dated the 18th May, which is given *in extenso*, ante, pp. 142, 143, the order dated 15th January, 1909, and the consent, dated 30th January, 1909, *ante*, p. 307.]

FitzGibbon, *K.C.*, *Pigot*, *K.C.*, and *F. Mooney*, appeared for Eugene Robinson.

S. L. Brown, *K.C.*, in reply:—

Section 26 only applies to a person entitled to sell under the Land Purchase Acts. This case would be unarguable if the land and the whole of the head-rent were vested in different persons. Why should the circumstance of half the head-rent being vested in the owner of the land make any difference? There can be no merger of an undivided moiety of the rent in the whole of the lands. Mr. Justice Wylie made an order redeeming both moieties of the head-rent, and he had no alternative but to make that order.

(1) L. R. 1 Ch. App. 516.

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May 7.

THE LORD CHANCELLOR:—

The appeal in this case has relation solely to that part of the order of the Master of the Rolls in which he declared that there had been no ademption of the devise made by the late Colonel Nugent in his will, in favour of the plaintiff, of his moiety of the fee-farm rent, £224 2*s.* 8*d.*, payable out of the lands recently sold to the Estates Commissioners under the Land Purchase Acts. The rent was divided between Colonel Nugent and the plaintiff, who was the owner of the other moiety. It is admitted that under the terms of Colonel Nugent's will, dated August 7th, 1890, devising to the plaintiff his share of the lands sold, the plaintiff became the devisee of the testator's moiety of the fee-farm rent, as well as of his absolute interest under the fee-farm grant, by virtue of which the lands were held by him. The late Colonel Nugent was declared to be of unsound mind in January, 1906, and his estate and property were, in due course, taken into the care of the late Lord Chancellor; Sir Walter Nugent being appointed the committee of the estate. Prior to his lunacy the deceased had made certain negotiations for the sale of the lands in question, but I do not consider it necessary to discuss them in any detail. I agree with the view regarding them of the Master of the Rolls, enunciated by him after a discussion of the proceedings, and I concur with the Master of the Rolls' opinion, that no contract was arrived at in the matter, until the order of the the 18th May, 1908, made by the late Lord Chancellor, accepting a proposal by the Estates Commissioners, dated April 7th, 1908, to purchase the lands for the sum of £5136, under section 6 of the Irish Land Act, 1903. That proposal took the usual form, and was duly laid before the Lord Chancellor in the lunacy matter of Colonel Nugent, then alive. He lived until December 28th, 1909. On consideration of the Estates Commissioners' proposal, the Lord Chancellor made the order of the 18th May, 1908, which has been so much the subject of consideration in this appeal, and the order is of such importance, having regard to the question raised, that it is necessary to specially note its terms. It was declared by the order to be for the benefit of the lunatic, and to be just and reasonable, that the

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property of the lunatic in the county of Meath, being the lands of Uttyneill, Hermitage, and Mullaghrea, should be sold to the Estates Commissioners for the purposes of the Irish Land Act, 1903, at the sum of £5136. It was further ordered that the committee should be at liberty through his solicitors to take all requisite steps for carrying out such sale, and to apply that the net amount available in respect of the purchase-money be in due course transferred to the credit of the lunacy matter, and separate credit of the sale of the said lands. That order was made under the authority of section 26 of the Irish Land Act, 1903, which enabled the Lord Chancellor in the circumstances of the case to order the lands to be sold, as if the sale was required for one of the purposes mentioned in section 63 of the Lunacy Regulation (Ireland) Act, 1871; it being provided that that section should apply accordingly. It is plain to my mind that the order of the Lord Chancellor of May 18th, 1908, accepting the proposal of the Estates Commissioners to buy the lands in fee-simple, was a distinct intimation by the Lord Chancellor that he was directing a sale of the whole interest in the lands belonging to the lunatic, not merely his interest as grantee under the fee-farm grant, but as well his moiety of the head-rent payable under the grant. The Lord Chancellor was well aware of the rights affecting the lands, and he knew that Mrs. Johanna Latham, the present plaintiff, was owner of the other moiety of the head-rent. He knew that Mrs. Latham's interest in that rent would have to be redeemed in the course of the sale; and in speaking of the net amount available in respect of the purchase-money, and in directing it to be transferred in due course to the credit of the lunacy matter and the separate credit of the sale of the lands, the Lord Chancellor, in my opinion, was undoubtedly dealing with the lunatic's whole interest in the lands. Indeed, to make that certain, it is only necessary to refer to the earlier part of the order, in which the Lord Chancellor directed the sale to the Estates Commissioners of the "property" of the lunatic in the lands—an inclusive term, covering, according to my view, the grantee's interest in the lands, and the moiety of the rent. That I take, too, to be the meaning of what the Master of the Rolls said upon the subject, and I agree with what he stated, in addition, to the effect that there

was nothing in the Land Purchase Acts to prohibit such a sale to the Estates Commissioners by a person who was, in relation to the estates being sold, at once the grantee of a fee-farm grant of the lands, and as well the owner of a moiety of the rent payable under the grant. The sale, no doubt, would have to be a sale of the lands in fee-simple, and accordingly the outstanding moiety of the rent, not the property of the vendor, would, in the course of the proceedings, have to be redeemed. That circumstance in no way appears to prevent a qualified vendor in such a case from selling his whole property in the lands, leaving it to the Estates Commissioners by the statutory procedure to redeem, out of the purchase-money of the lands in fee-simple, the other moiety of the rent. In such a view one sees at once the purpose obviously underlying the Lord Chancellor's order of the 18th May, 1908, where he spoke of "the net amount available in respect of the purchase-money" of the lands. Further light is thrown upon the construction and meaning of the Lord Chancellor's order, when we consider the consent dated January 30th, 1909, signed by Sir Walter Nugent, as the committee of the lunatic's estate, and by the plaintiff on her own behalf, relating to the agreed price to be paid out of the purchase-money to the plaintiff in redemption of her moiety of the rent. It is stated in the consent that the vendor (that is the lunatic), in addition to being owner of the grantee's estate in the matter, was also the owner of the other moiety of the rent, and that in consequence of that fact it was not necessary to deal with the redemption of the latter moiety. It is stated also, that by order in the lunacy matter of January 15th, 1909, the committee had liberty given to him to execute the consent in the form I have here mentioned, on behalf of the lunatic. Further, it was a provision in the consent that it be received and made a rule of Court—that meant a rule of Court in the Court of the Irish Land Commission—and the consent was filed accordingly.

By the reception, without any question, of that consent, the matter would appear to me to be concluded; and it is not to be wondered at that Mr. Ronan should have objected to the ruling made by Mr. Justice Wylie, on February 2nd, 1909, fixing the redemption price of Colonel Nugent's moiety at the same figure as agreed upon in the consent in respect of the plaintiff's. I am not aware of any order having been previously made for the

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redemption of the lunatic's moiety; and under Order VIII., Rule 4, of the Rules of July 2nd, 1910, the question of redemption price is not to be determined by the Judicial Commissioner until one month from the date of the order for redemption. The fixing of the price is left for that month to the parties interested, and the view of the Lord Chancellor, as conveyed in the consent of January 30, 1909, entered into by his authority, was plainly to the effect that no redemption price of the lunatic's moiety was necessary to be fixed, owing to his ownership of the whole estate in the lands, subject only to the redemption of the plaintiff's share of the rent. In the circumstances the ruling of Mr. Justice Wylie on February 15th, 1909, so far as it related to the lunatic's property in the rent, can in no way be relied on to alter or qualify the basis on which the Lord Chancellor, who was master of the situation, allowed the sale to proceed. The net balance of the purchase-money remaining after the payment to plaintiff of the redemption price of her interest in the rent, and the necessary payments for costs of carrying out the sale, will no doubt in due course, in pursuance of the Lord Chancellor's order of May 18th, 1908, be transferred to the credit of the lunacy matter, and placed to the separate credit of the sale of the lands.

The sale of the lands was, in my opinion, carried out upon the conditions I have indicated. I do not accept the first contention of the appellant that the Lord Chancellor had no authority to sell the lunatic's share of the head-rent, under section 26 of the Irish Land Act, 1903. It is the land in fee-simple that is sold and bought under the Land Purchase Acts; and it is, in my opinion, the necessary course to interpret the word "land" in section 26 as comprising every interest and estate constituting the fee-simple. The lunatic referred to in the section need not possess the whole fee-simple estate to be entitled to make a full sale under the Land Purchase Acts of the fee-simple of the lands. Nor is there anything whatever to indicate, in the case of an owner having a sufficient interest in the lands to qualify him under the Acts to sell the whole estate in fee-simple, that he could not sell all the property that he possessed in it. We must remark that "lands" comprise every interest and estate therein, whether corporeal or incorporeal; and the construction I have placed upon section 26

of the 1903 Act would be, in my opinion, the proper one, even if there was no reference in it to section 63 of the Lunacy Regulation (Ireland) Act, 1871. The express meaning, however, of section 26 of the Act of 1903 is, that the sale in the conditions mentioned in it may be ordered by the Lord Chancellor, as if the sale was required for one of the purposes mentioned in section 63 of the Act of 1871. That being so, I cannot but consider that the whole power of the Lord Chancellor under section 63 of the Lunacy Regulation Act, 1871, was at once capable of being brought into operation, for that is to be considered a newly added eighth purpose under that section, the purpose being to carry out a sale of an estate under the Land Purchase Acts. Wherever, accordingly, there is a lunatic under the care of the Lord Chancellor, possessing an estate or interest in the lands, enabling him if sane to sell the lands under the Irish Land Purchase Acts, it is placed within the power of the Lord Chancellor to sell the lands, or any estate or interest of the lunatic therein, for that purpose, in the same way as he could do so for any other of the seven purposes previously indicated in section 63 of the Act of 1871. It is to my mind certain that the late Lord Chancellor took that view, and, if he did, he had in my opinion full jurisdiction, and we must assume that he had to take it when he made the order of May 18th, 1908. He plainly felt that he was exercising the jurisdiction under section 63 of the Act of 1871, amended by section 26 of the Land Act of 1903. Nothing could demonstrate what I say more than the express terms of the order accepting the Estates Commissioners' proposal, where it was declared that the acceptance was made for the benefit of the lunatic, and to be just and reasonable, that the lunatic's property in the land should be sold to the Estates Commissioners, for the purposes of the Irish Land Act, 1903. That the transaction should be for the benefit of the lunatic, and should be just and reasonable, is the foundation for the Lord Chancellor's jurisdiction under section 63; and it has been the practice, accordingly, if not the actual duty, of the Lord Chancellor, to expressly make in his order such recitals in any exercise of his powers under the section. In reality, therefore, the Lord Chancellor acted under the section indicated in the Act of 1871, and made the order under it, for

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the authorized purpose mentioned in section 26 of the Land Act, 1903. In so doing he was in no way limited, as the learned counsel for the appellant suggested, to the sale merely of the physical lands. Under the condition of section 26 of the Act of 1903, he was entitled by the express words of section 63 to sell any estate or interest of the lunatic therein.

It was practically admitted by the learned counsel for the appellant that, if the view I have indicated was taken as the true meaning and effect of the new provision in the Land Act of 1903, the appeal now before us against the Master of the Rolls' order could no longer be maintained. Section 67 must necessarily apply to sales of lands for the new purpose introduced into section 63, as well as to sales for the previously existing purposes. If that is so, the unexpended moneys representing the estate and interests in the lands sold must stand in the place of the respective estate or interest sold, and the heirs, next-of-kin, devisees, legatees, executors, administrators, and assigns shall have such and the like interest in the said moneys as he or they would have had in the estate or interest sold. Such moneys are to be under the section of the same character as the estate sold, or otherwise disposed of, and the Lord Chancellor may make such orders, direct conveyances, deeds, and things to be executed and done as may be necessary for effectuating the provision of the section. It was in exercise of that jurisdiction that the Lord Chancellor, in his order of May 18th, 1908, directed that the net balance of the purchase-money should be credited in the lunacy matter, and to the separate credit of the sale of the lands. He was anxious by a very specific order to carry out what is a fundamental duty of the Lord Chancellor in exercising his lunacy jurisdiction, as stated by Lord Macnaghten in his judgment in the case, *Attorney-General* v. *Marquis of Ailesbury*(1), quoted by Mr. Ronan. On page 688 that learned lord stated it as a settled principle that, while in the ordinary course of managing a lunatic's estate the Court pays no regard to the interests or expectations of those who may come after, it is equally well settled that in matters outside the ordinary course of management it is the duty of the Court, so far as may be possible, not to alter the

(1) 12 A. C. 672.

character of the lunatic's property, or to interfere with any rights of succession. On page 690, Lord Macnaghten, on the same subject, and evidently with approval, refers to a passage from the judgment of the Master of the Rolls (Jessel) in *In re Ryder* (1), a decision of the Court of Appeal, and the case is of so much importance in relation to the general policy of the law that, in my opinion, I ought to specially refer to it. It was a case in which the Court sanctioned proceedings for carrying into effect the enfranchisement of a copyhold estate belonging to a lunatic, the rules of descent as to which were different from those as to the descent of freeholds, and the Court made a declaration that, in the event of the lunatic dying intestate as to the enfranchised property, his heir-at-law would stand seised thereof in trust for the persons who would have been entitled thereto as his heirs, according to the custom of the manor, if it had not been enfranchised. The Master of the Rolls, in giving judgment, said—"I am of opinion that a declaration, such as is asked for, ought to be made. The enfranchisement can only be made with the leave of the Court, and the Court, in granting leave, can impose such terms as are just. Now, it is a settled principle in lunacy, that the Court will not alter the right of succession to the lunatic's property." It was this last sentence to which Lord Macnaghten specially referred. The Master of the Rolls concluded by saying—"A declaration will, therefore, be made which will, on the death of the lunatic intestate, carry the equitable interest in the enfranchised copyhold to the persons who would have taken it, if it had not been enfranchised." Lord Justice Lindley concurred in that judgment.

Here, in Ireland, section 67 of our Lunacy Regulation Act of 1871 gives a statutory force to the settled principles on which the Court in England, exercising substantially the same statutory powers, acts in dealing with the property of lunatics under its care. No sale or disposition of a lunatic's lands can be ordered by the Lord Chancellor in Ireland, except for one of the purposes mentioned in section 63 of the Act of 1871, to which now is added by section 26 of the Land Act, 1903, the purpose of the sale under the Irish Land Purchase Acts. As I have pointed out,

(1) 20 Ch. D. 514.

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by section 67, in full conformity with the purpose involved in the established practice stated by Lord Macnaghten, the proceeds of such sales or dispositions are treated in all respects as subject to the devises and legacies that affected the lands sold or otherwise disposed of. No one, judging properly the real meaning of the Lord Chancellor's orders in the present lunacy matter, can doubt that it was the intention of the Lord Chancellor in no way to alter the character of the lunatic's property, or to qualify the devolution of its proceeds. He treated them in the sense of section 67 of the Act of 1871, and on that basis he directed the lodgment of the whole moneys payable to Colonel Nugent to be made to the separate credit of the sale of the lands. Apart, however, altogether from the said section 67, the case of *The Attorney-General* v. *The Marquis of Ailesbury* (1), if fully examined, is, in my opinion, an authority in favour of the Lord Chancellor's jurisdiction and power in that respect; and inasmuch as the Lord Chancellor's intention was unequivocally what I have said, I think it would be impossible to hold that there was an ademption of any part of the devise made by Colonel Nugent's will to the plaintiff in this case.

I have no intention, in the circumstances, of making any detailed discussion of the position that would exist, even if the Court were to decide that the case was really one of a compulsory redemption of the lunatic's moiety of the rent. The matter is one of great importance, and while I refrain from expressing any settled view upon it, it would, I think, be an oversight if I did not say that in dealing with the property of a person incompetent to manage his affairs, the passage on the subject, relating to the compulsory acquisition of such a person's property, and the question of the devolution upon his death of the proceeds of such a proceeding, contained at pp. 608–609 of Lord Macnaghten's judgment in the *Ailesbury Case* (1) would afford a ground of grave controversy upon the question, even on the presentation made of this case by the learned counsel for the appellant.

I, accordingly, think that the appeal should be dismissed with costs.

(1) 12 A. C. 672.

HOLMES, L.J. :—

The purchase of Colonel Nugent's estate, which has given rise to this appeal, was made by the Land Commission under the provisions of the Irish Land Act, 1903, section 6. He held the estate under an old fee-farm grant which reserved a high rent, one moiety of which had become vested in the Colonel himself and the other in Mrs. Latham.

There is no doubt that section 6 enabled him to apply to the Land Commission to inquire into the circumstances of the estate with a view to the sale thereof, and authorized that body to purchase it at a price estimated by them. If Colonel Nugent had remained sane, he might have himself accepted the offer of the Commission to purchase for the sum of £5136, and the contract thereby made by him would have been a contract to sell the lands for an estate in fee-simple, freed from all incumbrances and charges of every kind. Out of the purchase-money, the Land Commission would be obliged to ascertain and pay all charges on the lands which did not belong to the vendor. For example, it would have been necessary to redeem the moiety of the fee-farm rent to which Mrs. Latham was entitled out of the purchase-money; and the redemption price would have been ascertained by the Judicial Commissioner, but when this and all other charges were satisfied, the residue of the purchase-money would have belonged to the vendor.

Unfortunately Colonel Nugent became insane before any contract of sale was entered into between him and the Land Commission; but the Lord Chancellor was by section 26 of the Act of 1903, taken in connexion with the Lunacy Regulation (Ireland) Act, 1871, section 63, placed in the same position in reference to the sale of the estate under section 6 as that of the owner before he became a lunatic.

Accordingly the Land Commission having offered to purchase the estate for £5136, the Lord Chancellor, by his order of the 18th May, 1908, directed on behalf of Colonel Nugent that the proposal be accepted. It cannot be denied that he had jurisdiction to make this order by section 26 of the Act of 1903, and I am satisfied that the result was the same as what I have stated

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would have been the result if the owner, having continued sane, had accepted the proposal; that is to say, that there would be a contract by the Land Commission to purchase the entire estate for the price agreed on; and that, after the charges to which others were entitled had been paid thereout, the balance would have belonged to the lunatic.

That this was the view of the Lord Chancellor is shown by the final words of his order directing that the net amount available in respect of the purchase-money—meaning the net amount after all charges thereon had been paid—be transferred to the credit of the lunacy matter.

In January, 1909, the purchase-money was provided for distribution, and it was necessary to ascertain the redemption price of the moiety of the head-rent to which Mrs. Latham was entitled. Accordingly, by an order of the 15th of that month, the Lord Chancellor gave the committee liberty to consent to the redemption thereof at the price of £2500, and to apply to the Land Commission that the balance of the purchase-money of the estate might be invested. Accordingly a consent to that effect was executed on the 30th January, 1909, and filed in the Land Commission. This consent contained a recital, the accuracy of which seems to me to be evident, that, in consequence of the vendor being the owner of the other moiety of the head-rent, it was not necessary to deal with the redemption thereof.

It is true that Mr. Justice Wylie, in the final schedule, purports to fix the redemption price of the lunatic's moiety at £2450. This was unnecessary, and does not affect the question we have to decide, as it cannot affect the rights of Mrs. Latham.

The argument of the appellants, that what was purchased by the Land Commission was only the physical land, reminds me of a fantastical discussion to be found in a work once attributed, but, I believe, erroneously, to Henry Fielding. What the Commission is authorized to purchase by section 6 is an estate—that is to say, not only the land and premises that can be seen and touched, but every interest belonging thereto or arising thereout. The £5136 includes the price of the lunatic's moiety of the head-rent as much as the grass growing on the land in his occupation. Equally weak is the reliance placed on there having been no

merger of his moiety of the head-rent in the lands. This may be so technically; but we are dealing not with technicalities but realities; and I have no doubt that his moiety was part of the property sold by the Lord Chancellor.

It only remains for me to apply to the solution of the questions to be decided by the Court the conclusions at which I have arrived. The first question causes no difficulty. It relates to a devise in Colonel Nugent's will "of my share of the lands" in Moynalty and Kilbegs to Mrs. Latham, and asks whether it operates as a devise of the testator's moiety of the fee-farm rent as well as of the grantee's estate under the fee-farm grant. There is no doubt that this is its effect.

Then comes the question whether the sale to the Land Commission caused a conversion of the two interests of the testator or of either of them, followed by the further question whether the said interests or either of them were adeemed; and, if so, did such property pass to the heir-at-law, or the next-of-kin, of the testator. I have stated my opinion, that a sale of the estate to the Land Commission, either by Colonel Nugent himself, when sane, or, after he was found a lunatic, by the Lord Chancellor under section 6 of the Act of 1903, would be a sale of the whole estate, including the two interests therein of Colonel Nugent; but it is not to be assumed that the effect of the sale on the devise to Mrs. Latham would be the same in either case. On the contrary, if Colonel Nugent had been the vendor, it would probably, or at least possibly, follow that there would be a conversion of the real estate sold, and an ademption of the gift thereof to Mrs. Latham.

But where the Lord Chancellor orders the sale of a lunatic's estate pursuant to section 26 of the Act of 1903, the sale must be regarded as a sale under the Lunacy Regulation (Ireland) Act, 1871, section 63; and there is applicable thereto section 67, which enacts that the devisees of the person whose estate is so sold shall have such and the like interest in the surplus moneys, remaining after the purposes for which the moneys have been raised shall have been answered, as they would have in the estate if no sale thereof had been made. I have no doubt that the effect of

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this provision in the present case is to give Mrs. Latham, the devisee of the lands, so much of the purchase-money thereof as her testator was entitled to at his death.

I therefore concur in affirming the judgment of the Master of the Rolls. I think, however, that one observation made by him may possibly be misunderstood.

He says that he cannot see any valid reason why the Lord Chancellor could not have in respect of a lunatic's estate the right every owner of a head-rent has—the right by voluntary agreement to sell such superior interest. If by this is meant that the Lord Chancellor can sell to the Land Commission under section 6, a lunatic's superior interest in lands as a separate and distinct subject of sale, I am unable to agree with the proposition, inasmuch as under that section the Land Commission is only given authority to purchase the whole estate for a sum to be estimated by that body as the price of every interest therein.

CHERRY, L.J.:—

I entertain no doubt that the judgment of the Master of the Rolls in this case was correct, and that there has been no ademption of the devise by the will of Colonel Nugent of the lands of Hermitage to Mrs. Latham.

The question turns on the true construction of the 26th section of the Land Act, 1903. It was admittedly in exercise of the jurisdiction conferred by this section that the late Lord Chancellor ordered the sale in the lunacy matter of the lunatic's "property" in these lands to the Estates Commissioners. Mr. Brown for the next-of-kin of the lunatic now contends that "land" in that section means the soil itself; the corporeal thing, as distinguished from any particular estate in the soil. He says that the only object of the section is to enlarge the scope of possible vendors under the Land Purchase Acts, and that it does not apply at all to the sale of a superior interest. In the present case the really valuable estate of the lunatic in the lands was the moiety of the fee-farm rent of £224 2*s.* 8*d.* issuing out of them, so that it is of importance to see whether that interest was really included in the

sale by the Lord Chancellor under this section, or whether it has only been redeemed under the compulsory powers for the redemption of superior interests conferred by the Land Purchase Acts, *i.e.* by the 15th and 16th sections of the Land Act, 1887, and the 31st section of the Land Act, 1896.

There is no definition of the word "land" in the Land Purchase Acts. A "holding" is defined by the 57th section of the Act of 1881 as "a parcel of *land* held by a tenant of a landlord, &c." In this definition the word "land" is evidently used as applying to the soil itself as distinguished from any estate in the land, but I do not think it can be similarly restricted when the word is used in reference to sales under the Land Purchase Acts generally, as Mr. Brown contended in the present case. Land cannot, according to our law, be treated like a pound of butter or a sack of potatoes. A sale of land must mean a sale of some estate or interest in the land recognized by our law; a fee-simple estate; a term of years; or a yearly tenancy; and there may be of any of these estates or interests either an absolute or a limited ownership. Any or all of these estates and interests may be comprised in a sale of "land." But to talk of a sale of land as distinct from a sale of some estate in the land is to my mind unmeaning.

The real restriction as to the meaning of the term "land" when used in the Land Purchase Acts arises from the purchaser's point of view. He must acquire or possess the right of occupation, otherwise he does not get the "land"; and he can only buy under those Acts, either where he already is in occupation, or where he will be entitled to go into occupation on the completion of the sale. He can only purchase, under the Acts, either from his own immediate landlord, or from the Estates Commissioners. Consequently the only persons who can *sell* lands under the Land Purchase Acts are owners who are either in receipt of the rents from occupying tenants or in actual occupation themselves. A head landlord can never (except in the limited number of cases provided for by section 15 of the Act of 1903) sell to a sub-tenant directly; and an immediate landlord who so sells must be either an absolute owner or a

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tenant for life or other limited owner within the definitions contained in the 33rd section of the Landlord and Tenant Act, 1870.

The 17th section of the Land Act, 1903, provides that where any person "proposing to sell lands" gives *prima facie* evidence that he is "a person having power to sell under the Land Purchase Acts," and that he has been for a period of six years "in receipt of the rents and profits of the land," he may be dealt with "as the owner of the land for all purposes other than the distribution of the purchase-money." The meaning of this section is, to my mind, perfectly clear. It is that where a person is possessed of such a freehold or leasehold estate as qualifies him to sell under the 33rd section of the Act of 1870, and has been in receipt of the rents from the occupying tenants for six years, or has been himself in occupation of the lands for that period, he acquires a statutory power to sell either to the occupying tenants or to the Land Commission not only his own estate in the land, but also that of all other persons, whether remaindermen, reversioners, owners of rent charges, mortgagees or other incumbrancers, so as to vest in the purchasing tenants the fee-simple in possession of the lands.

I now come to the consideration of section 26, upon the construction of which the whole question in this case turns. It is obvious that the words, "a person who would otherwise be entitled to sell land under the Land Purchase Acts," in that section have the same meaning as "a person having power to sell under the Land Purchase Acts" in section 17. The only effect of the section is, therefore, to enable the Lord Chancellor by his order to do what the lunatic, if he were a sane person, could do himself, *i.e.*, sell, not only all his own estate in the lands, but also that of every other person therein. If the Lord Chancellor orders the land to be sold, and the Estates Commissioners agree to purchase, as in the present case, they can then make an order under section 16, vesting the fee-simple in the lands in themselves, subject only to the various rights and charges mentioned in that section.

To argue, as it was attempted to be argued here, that the effect of section 26 was only to enable the Lord Chancellor to sell the estate or interest immediately above that of the occupier in the lands, and that recourse must be had to the compulsory powers of redemption in order to vest in the Land Commission the lunatic's estate in the moiety of the fee-farm rent payable thereout, is quite contrary to the terms of the Act of 1903. If the lunatic were only possessed of the moiety of the fee-farm rent, and if he had not been in receipt of the rents from the occupying tenants, it is probable, I think, that no order could have been made under this section, and the moiety of the fee-farm rent payable to the lunatic should have been in that case redeemed under the compulsory powers; but once the jurisdiction conferred by that section is acquired, the Lord Chancellor has power, in my opinion, to sell, at all events, all estates in the lands possessed by the lunatic.

This was evidently the view of the matter taken by the late Lord Chancellor, Sir Samuel Walker, when he made his orders of the 18th May, 1908, and 15th January, 1909. By the first he declared it to be for the benefit of the lunatic to sell "the property" of the lunatic, "being the lands" of Hermitage, &c., for £5,136. The lunatic's "property" in the moiety of the fee-farm rent cannot possibly be held to be outside the scope of this order. The subsequent order of the 15th January, 1909, makes the matter, if possible, still more plain. By that order power was given to the Committee to consent to the redemption of *one moiety* of the head rent for £2500, and it was directed that "the balance of the purchase-money *of the estate*" of the lunatic should be invested. This balance included, of course, the purchase-money of the other moiety of the fee-farm rent. It is quite clear to my mind that Sir Samuel Walker considered the question before he made these two orders, and that his view of the construction of the section was the same as that adopted by the Master of the Rolls.

Once it is established that the sale of the moiety of the fee-farm rent was made under the powers conferred by section 26 of the Land Act, 1903, it is clear that it must be dealt with as

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if it were made under the 63rd section of the Lunacy Act, 1871, and it is admitted that in such case section 67 of the same Act effectually prevents any ademption in the present case. I therefore agree that the order of the Master of the Rolls should be affirmed.

Solicitor for Mary E. Duffy: *C. MacMahon.*
Solicitors for Eugene Robinson: *G. D. Fottrell & Son.*
Solicitors for the plaintiff: *O'Keeffe & Lynch.*

W. G.

THE NEW IMPERIAL AND WINDSOR HOTEL COMPANY, LIMITED, *v.* JOHNSON.

(1910. No. 1065.)

Barton, J.
1912.
April 23, 24, 25.
May 8.

Injunction—Nuisance—Noise at night—Large city—Singing and dancing—Reasonable user of premises—Substantial discomfort.

The plaintiffs, the proprietors of a hotel in the city of Belfast, applied for an injunction to restrain the defendant, the proprietor of tea-rooms and a restaurant on the opposite side of the street, from using his premises for the purpose of music, dancing, or other entertainments, so as to cause a nuisance to the plaintiffs, their servants, and guests. The plaintiffs complained of interference with the sleep of their servants and guests, and required that defendant's premises should be altogether closed after midnight.

Held, under the circumstances the plaintiffs were entitled to a limited injunction to restrain the defendant from causing a nuisance by keeping the windows open after midnight while music and dancing were going on, and from permitting persons entering or leaving the premises after midnight to cause a nuisance by singing or other noise.

Among the noises, which, if they do not cause substantial discomfort, residents in large industrial cities may have to put up with, is a certain amount of noise which accompanies and is incident to the reasonable recreation of a crowded population. The question, in every such case, is whether such noises amount to a sensible or substantial interference with the comfort of neighbouring dwellers, according to ordinary sober commonsense standards.

TRIAL OF ACTION.

The plaintiffs were the owners of the premises No. 18 Donegall Place, Belfast, where they and their predecessors in title for many years carried on a large hotel business, their books showing never less than 1000 visitors a month. There were sixty-nine bedrooms in the hotel, of which twenty-nine looked out on Donegall Place. The defendant was the proprietor of restaurant premises on the opposite side of Donegall Place, and for 18 feet directly opposite. The distance between the hotel and restaurant was 78 feet. The lower part of the restaurant premises was let as shops; the upper part consisted of one large room with partitions, measuring 47 feet by 22 feet when the partitions were removed, with a smaller room and offices at the back. There were windows facing Donegall Place, the lower part of which opened vertically, the upper part horizontally.

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The premises were used as a restaurant, known as Johnson's Tea Rooms, during the day, and at night were hired out for dances, concerts, whist-drives, and evening parties, chiefly to the employees of large business houses in Belfast, church choirs, and clubs. The numbers present at the entertainments varied from about 50 to 100. They usually began at 8 or 8.30 p.m., and closed at 2 or 2.30 a.m. The entertainments took place two, three, or four times a week during the winter months only. The present defendant took a lease of the premises eighteen years ago, which expired in 1904. In 1904 he took a new lease at an increased rent for ten years.

No complaint was made till 1st November, 1910, when a letter was written by the solicitor for the plaintiffs, complaining of the nuisance caused by the noise of music and dancing, and specifying two particular dates on which he alleged the noise prevented guests in the hotel from sleeping. The defendant replied that he would do his best to abate the matter. A second complaint was made on the 7th November, 1910, stating that on three further dates the noise was worse than ever. The writ was then issued.

The plaintiffs, in their statement of claim, alleged as follows:—

"2. In the month of October, 1910, the defendant began to use his premises for the purpose of giving dancing parties or social gatherings. These parties attracted a large number of persons of both sexes to the premises, and were kept up till a late hour of the night. They were given frequently, and were accompanied by much noise, dancing, and shouting.

"3. In consequence of the noise of the music, dancing, and shouting, accompanying these parties, the guests in the plaintiffs' hotel were unable to get their rest. They complained, and some of them left, and plaintiffs' trade suffered. Plaintiffs' employees were also much disturbed and annoyed by the noise.

"4. Plaintiffs complained through their solicitor, and the defendant, both verbally and by letter, promised to abate the nuisance. Notwithstanding his promises aforesaid, defendant did not abate the nuisance, and the noises of music and shouting, frequently kept up till a late hour of the night, have continued. Plaintiffs aver that the defendant intends to continue using his premises as he has been doing for the purpose of giving these dancing parties or social gatherings unless he is restrained by injunction.

"5. The noises accompanying these dancing parties or social gatherings constitute a nuisance to the injury of the plaintiffs. The guests and employees in plaintiffs' hotel are prevented by them from getting their proper amount of sleep, and they complain of them. Plaintiffs' trade has suffered in consequence of them."

The prayer of the statement of claim was for an injunction restraining the defendant from using or permitting to be used the premises No. 27 Donegall Place, or any part thereof, for the purpose of dancing, music, or other entertainments whereby a nuisance may be occasioned to the injury of the plaintiffs as the owners of the Imperial Hotel, Donegall Place, Belfast, and to the annoyance and injury of the visitors and employees in the hotel, and for damages and costs.

The material parts of the defence were as follows:—

"2. The defendant denies that in the month of October, 1910, he began to use his said premises for the purpose of giving dancing parties or social gatherings, or that the parties or social gatherings given by him in the said premises attracted large numbers of people or any people to the said premises, or that parties or social gatherings were given by the defendant therein frequently, or at all, or that there was any noise of music, dancing, or shouting, made in the defendant's said premises, such as could interfere with the comfort or health of the plaintiffs' servants, guests, or customers.

3. The defendant denies that the guests in the plaintiffs' hotel were unable to get their rest in consequence of music, dancing, or shouting in defendant's said premises, or at all, or that the said guests, or any of them, complained or left, or that the plaintiffs' trade suffered by reason of such music or dancing, or shouting, or at all, or that the plaintiffs' employees were disturbed or annoyed by such noises.

"4. The defendant admits that the plaintiffs complained through their solicitor, but deny that the defendant verbally or by letter, or at all, promised to abate any nuisance. The defendant denies that since the said complaint by the plaintiffs there have been any noises in the defendant's said premises, such as could interfere with the comfort or health of the plaintiffs' servants, guests, or customers, or such as constituted a nuisance.

"5. The defendant denies that the noises made in his said

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premises constitute or ever constituted a nuisance, or that the guests or employees, or any of them, in plaintiffs' hotel are, or ever have been, prevented from getting their proper amount of sleep by reason thereof, or that the said guests or employees, or any of them, complain of such noises, or that the plaintiffs' trade suffered by reason thereof.

"6. Part of the business carried on by the defendant in his said premises consists of letting of rooms therein for the purpose of evening parties and dances, and the defendant says that he carries on and always has carried on that part of his business in a reasonable and proper way, and without undue or excessive noise, having regard to the nature of the locality in which the said premises are situated, which is a purely business locality.

"7. Admitting for the purposes of this defence, but not further or otherwise, that the business in paragraph 6 hereof mentioned, or that the way in which the said business is conducted, amounts to a nuisance to the plaintiffs, the defendant says that for more than twenty years from the commencement of these proceedings the said business has been carried on by him, or his predecessors in title, in the same way as that in which it is now being carried on.

"8. Admitting for the purpose of this defence, but not further or otherwise, that the business in paragraph 6 hereof mentioned, or that the way in which it is conducted, amounts to a nuisance to the plaintiffs, the defendant says that for many years previous to the commencement of these proceedings the said business has been carried on by the defendant, or his predecessors in title, and that by reason of the laches and acquiescence of the plaintiffs, and their predecessors in title, the plaintiffs are not entitled to the relief claimed."

The material portions of the evidence are sufficiently summarized in the judgment.

Serjeant Matheson, K.C. (with him *John M'Gonigal, K.C.*, and *T. W. Brown*), for the plaintiffs :—

Every person inhabiting a locality in which persons live is entitled as of right to have the night free from noise which may disturb his rest: *Bellamy* v. *Wells* (1); *Inchbald* v. *Robinson* (2);

(1) 60 L. J. Ch. 156. (2) L. R. 4 Ch. App. 388.

Kerr on Injunctions, 4th Ed., p. 159; *Becker* v. *Earlscourt (Ltd.)* (1). The plea of laches is inapplicable to this case, because the defendant has not incurred expense on the strength of not being disturbed: *Archbold* v. *Scully* (2).

S. L. Brown, K.C., and *D. M. Wilson, K.C.* (with them *M. G. Ellison*), for the defendant:—

This is not a residential locality; persons living in a city must take things as they find them. The business is carried on in a perfectly proper manner, and is a legitimate business. There has never been a complaint till November, 1910, and the defendants have taken a lease at an increased rent on 14th June, 1904, for ten years.

John M'Gonigal, K.C., in reply.

May 8.

BARTON, J.:—

The plaintiffs are the New Imperial and Windsor Hotel Company, Limited. They are the owners of the Imperial Hotel in Donegall Place, Belfast. It is a well-known and high-class hotel, which makes a speciality of commercial business. It has a large number of bedrooms, twenty-nine of which are in front, facing Donegall Place. The hotel, which has been in existence for a great many years, was acquired by the plaintiff company in 1901. Since that time the business has increased, and the hotel has reached its maximum of prosperity and popularity. The number of visitors per month never falls below 1000, and sometimes rises to 1400. The plaintiffs do not, and cannot, complain, in this action, of an injury to their business or profits. These have, in spite of the alleged nuisance, steadily increased, and could hardly reach a higher point. The action is brought to restrain an alleged nuisance entirely on the ground of comfort and convenience. The complaint is, that the defendant, who is the owner of a tea-room and restaurant, lets his first floor front apartments for evening parties and dances, by reason of which it is said that the occupants of plaintiffs' hotel are disturbed, and their sleep is interfered with. The plaintiffs insist that defendant should shut his

(1) 56 S. J. 73. (2) 9 H. L. Cas. 360.

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establishment at midnight, and that the Court should restrain him from carrying on the business after that hour. They say that nothing short of that will be of any use to them. That is what they have required him to do, and what they insist on the Court directing to be done. In some respects, to which I shall have to refer, the plaintiffs' case is singularly weak and deficient; but, before I come to refer to those deficiencies, it will be necessary to state what is defendant's business, and what are the noises complained of.

The defendant, Mr. Johnson, is the proprietor of a tea-room and restaurant on the opposite side of Donegall Place, 78 feet from the hotel. He also lets his rooms for evening parties and social gatherings, meetings of societies, choirs, concerts, and dances. The dances are the only parties complained of, because they are the only ones which are prolonged after midnight. These dances are principally got up by the employees of the large establishments in Belfast. Sometimes the employer is himself present, sometimes the manager. They are thoroughly respectable gatherings, such as, I suppose, must take place somewhere in every commercial city. One of the necessary incidents of the social life of an industrial city is a certain amount of recreation and innocent amusement, taking the form of social gatherings of the respectable young men and women who do a large proportion of the daily work of the city. To call this place a dancing saloon is inappropriate and inaccurate. The witnesses produced before me were not picked witnesses. They were selected because they were the persons concerned in getting up dances on the particular evenings complained of. It would not be possible in any Court to produce from any city young men and women more respectable, so far as appearance and demeanour could afford any guidance on such a subject. The proprietor himself, who has carried on the tea-room in the same way and for the same purpose for eighteen years, is obviously anxious to conduct it on the best possible lines without annoyance to anybody, and, if his attention had been called to any specific grounds of complaint, he would, I feel sure, have done his utmost to obviate them.

But a nuisance is not justified by showing that the occupation causing it is innocent or laudable. However innocent or laudable

the business or practice may be, it must not cause substantial discomfort to others. Let us see what are the noises complained of. The music itself consists of one piano, with the addition of an occasional violin. One witness objected to the piano; but there is no serious complaint that the instrumental music is too loud. It could hardly be less obtrusive. There is no case, as has been made in some cases, of a large and noisy band. What is complained of is singing in chorus, during the dancing. I gather that, in the Lancers or similar dances, popular airs are chorused or joined in by the dancers. This is the only singing complained of; because the solo singing or concert singing, with which these entertainments sometimes begin, is over before twelve. The inference which I draw, as to the singing during the dancing, is, that if the windows of the dancing room are kept open, the singing might interfere with the sleep of persons in the opposite bedrooms; but if the windows are kept shut, it would not carry across the street any noise which would inflict any substantial discomfort upon any ordinary sleeper. The proprietor recognizes the necessity of keeping the windows shut, and directs it to be done. The defendant's rule is to keep the windows shut; but when he is away, the rule is not always observed. He spends part of the year in Edinburgh; and I infer that his assistant does not insist on what I believe to be the rule which the proprietor wishes to have observed. These parties are only held in winter; and I gather that it is not impossible to ventilate this room without keeping the windows open, at all events while dancing, singing, or music is going on. If the proprietor's direction to keep these windows shut had been strictly observed, there would be very little real ground for complaint in this case. The next matter complained of is, that the young men sometimes go out to refresh themselves at a neighbouring club, and make a noise at the door in order to get re-entrance. This is a very occasional matter, which in itself can, I am sure, be stopped if attention is specially directed to it.

There remains another matter which has given rise to some reasonable complaint, namely, the noise in the street when the parties break up, which usually takes place between 2 and 3 a.m. The young men and women sing "Auld Lang Syne" or some other

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song; and there is a noise of a kind, which is not unusual when festive gatherings of young people break up. There is no harm whatever in this noise, except the time and place. The police say that, when spoken to about it, the young people always ceased these noises; and I see no reason to suppose that it could not be prevented or avoided.

Now, I turn to the plaintiffs' claim, which is that these late parties should be stopped altogether. Their counsel, at the close of the case, candidly stated that nothing would satisfy them but that the parties should be prevented after twelve o'clock. That is the demand which the defendant has had to meet—a very serious demand for a business man who has carried on a business for eighteen years, and agreed to pay an increased rent in view of the business he is able to carry on.

This brings me to a feature of the evidence which was presented in support of the plaintiffs' case. The evidence shows that the visitors to the hotel number from 1000 to 1400 a month. Allowing for what I may call "double entries," they probably exceed 10,000 a year. Yet not a single visitor has been called to say that he ever was inconvenienced, or that he ever lost a minute's sleep. There is evidence that some guests asked for back rooms. There are plenty of city noises which might account for that. I daresay that some visitors complained of the noises caused by defendant's dances. But such persons should be here to state exactly what degree of discomfort they may have experienced, and to submit to cross-examination, so as to enable the Court to judge whether the discomfort was substantial or not. In nearly all cases of nuisance within my experience, where the complaint came from a place of business, the evidence of customers and other independent persons frequenting the place has been the mainstay of plaintiffs' case. I cannot help inferring, in the present case, that the visitors to this hotel have experienced less discomfort or inconvenience than has been suggested.

Three witnesses have been called by the plaintiffs from the hotel. The first is the night porter, whose duty it is to keep awake at night; in fact, I suppose, he usually sleeps during the day, in order to prepare himself for that duty. The others were the

lady book-keeper, and the manager. The lady book-keeper, who was justly congratulated by defendant's counsel upon her appearance of radiant health, gave evidence which I accept as substantially correct, and from which I mainly draw the inferences already referred to. The manager's evidence is open to this comment. He slept in a front room from 1901 to 1908, for seven years. The same thing was going on all that time. Yet he never made the slightest complaint. He was living 78 feet away from the opposite house, which had the proprietor's name over the door. Yet he never called on him, or wrote to him, or conveyed to him, directly or indirectly, that anything was going on at these dances to which he could reasonably object. A question naturally suggests itself. What made him suddenly in November, 1910, discover that what had so long been endured without complaint was intolerable? Counsel, in opening the case, said that he first became aware of his legal rights by reading in a newspaper a report of a case of *Hull* v. *Mairs* (1) in this Court, in which night noises were complained of, and an injunction given. If so, he was misled by what he read. The night noises were a negligible point in that case, which turned on vibration by the traffic of heavy carts affecting the health and nerves of the occupiers of a house, through which the traffic passed under an archway.

The other witnesses for the plaintiffs were two bank clerks who sleep in neighbouring premises, and five policemen, who from time to time patrol this place. The latter testified to the respectable character of defendant's house and of the entertainments that took place there. They all said that, in their opinion, the noises which they heard, as they passed under the windows, would disturb visitors in the hotel opposite. I confess I should like to have seen in the witness box some of those visitors. Everything in a case of this kind turns upon the degree of discomfort. The question is, was it substantial or not? Upon that question the opinion of policemen who occasionally walked under the windows, although worthy of all due respect and attention, is a poor substitute for the evidence of the visitors themselves, of whom there were so many thousands.

(1) Judgment, 21st December, 1908, unreported.

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The defendant has been conducting his tea-rooms in substantially the same way for eighteen years, and no complaint has ever before been made. He has renewed his lease at an increased rent. That circumstance does not in itself entitle him to rely upon the defence of laches or acquiescence. But, the fact that these noises have been tolerated for so many years without a murmur supports the view that they are not really so intolerable as is now suggested.

Even after this action had been commenced, the plaintiffs' attitude towards this alleged nuisance was singularly tolerant and complacent. The writ was issued in November, 1910. The statement of claim was not delivered until the plaintiffs had been stimulated by a motion in July, 1911, to dismiss the action for want of prosecution. I have heard no adequate explanation of that delay.

At the termination of the case, I had come to the conclusion that the injunction, which the plaintiffs claimed, should not be granted—namely, to stop the business at twelve o'clock. If I were to make such an order, I daresay there would be a crop of similar actions claiming injunctions. Similar establishments exist in the neighbourhood and elsewhere in the city. In some cases the dancing-room is at the back of the premises. But that circumstance would only change the quarter from which complaint would come. The back of one house is likely to be near the backs of other houses. Among the noises which, if they do not cause substantial discomfort, residents in large industrial cities may have to put up with, is a certain amount of the noise which accompanies and is incident to the reasonable recreation of a crowded population. In the fashionable quarter of a city a similar discomfort is experienced at certain seasons, and, within due limits, may have to be submitted to. The question, in every such case, is whether such noises amount to a sensible or substantial interference with the comfort of neighbouring dwellers according to ordinary sober commonsense standards.

I was referred to authorities which, when examined, do not carry the plaintiffs very far in the present case. In *The Earlscourt Exhibition Case* (1) there was evidence of very serious interference

(1) 56 S. J. 73.

with the comfortable enjoyment of plaintiff's house injuriously affecting the health of the family. It was like the case in this Court, already referred to, of *Hull* v. *Mairs* (1). Injury to health is not a necessary element in cases of nuisance by noise. But it is an important element, and makes that case a very different case from this one. In *Bellamy* v. *Wells* (2) it was the cheering of crowds in the street which was enjoined. The Court, at p. 163, said that the case as to concerts and internal noises in the club clearly failed, and the costs of that part of the case were disallowed. That case was quite unlike this one.

The question remains whether this is not a case calling for a limited injunction, restricted to keeping the windows shut while music and singing is going on after midnight, and to preventing street noises upon the occasion of visitors entering and leaving the premises after midnight. As regards the windows defendant admits that it would not be proper to leave them open while music and singing were going on; and the evidence shows that, while he is not there, the windows have been frequently open. The noises in the street are, no doubt, an occasional disturbance—a disturbance which I think is perfectly preventable. On the other hand, plaintiffs never specified those limited causes of complaint, or drew defendant's attention to them, or asked him to prevent them. In judging of the merits of a nuisance case, it is reasonable to inquire what is the complaint and demand which plaintiffs have made, and what it is that the defendant has been asked to do or not to do, and what he has persisted in doing or not doing.

Plaintiffs' counsel have stated that nothing short of an injunction to stop defendant's business after twelve o'clock will satisfy them. They did not bring this action to shut defendant's windows, but to shut his shop. But the Court's hands are not tied, because plaintiff puts his claim too high. That is a matter which, among others, can be taken into consideration upon the question of costs. The injunction will be to restrain the defendants from permitting the noise of singing, dancing, and music to cause a nuisance to the plaintiffs, their servants and guests, by the windows or other apertures of the room in which such music,

(1) Judgment, 21st Dec. 1908, unreported. (2) 60 L. J. Ch. 156.

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singing, or dancing is carried on, being kept open after twelve o'clock, while the same is being carried on; and from permitting any person entering or leaving the premises after twelve o'clock to cause a nuisance to the plaintiffs, their servants, and guests, by singing or other noise. It is necessary, in this case, to specify these particulars, because, having regard to the case which plaintiff has made, an injunction in a general form, which is sometimes suitable and sufficient, would be liable to be misunderstood by one or other of the parties. For the reasons I have mentioned, I grant this limited injunction without costs.

Solicitor for the plaintiffs: *Frank Kerr.*
Solicitor for the defendant: *J. L. Galway.*

E. C. F.

MELVIN *v.* BALLINASLOE (No. 1) RURAL DISTRICT COUNCIL.

Barton, J. 1912. May 6.

(1912. No. 237.)

Practice—Transfer of action to County Court—Action for injunction against trespass and damages—Jurisdiction—Separate valuation—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56, *ss.* 31, 36).

Where an action is brought which, while in form an action for an injunction and damages, is in substance an action of trespass, the land in dispute being within £30 valuation, the Court may, in the absence of a sufficient reason for retaining the case in the High Court, transfer it to the County Court. A separate valuation may be obtained by either party, from the Valuation Office, for the purposes of the motion to remit.

MOTION by the defendant for an order transferring the action to the Civil Bill Court of the county of Galway.

The plaintiffs John H. Melvin and Eliza Melvin were the owners of part of the lands of Lakefield in the county of Galway. The valuation of the lands exceeded £30. The Ballinasloe Rural District Council acquired by agreement a plot of one acre

on the lands under the provisions of the Labourers (Ireland) Act, for a labourer's cottage. The plot was fenced in, and the compensation money for it paid to the plaintiffs. It was subsequently discovered that the plot was less than one acre. The labourer then fenced in a portion of the field round his cottage, and the plaintiffs contended that he had in seventeen perches too much.

The prayer of the statement of claim was for (1) an injunction to restrain the defendants, their agents, bailiffs, servants, and tenants from entering or trespassing upon plaintiffs' said lands; (2) damages for the wrongful entry aforementioned; (3) further or other relief; (4) costs.

Subsequently to the delivery of the statement of claim, the defendants applied to the Valuation Office for a separate valuation of the seventeen perches, which they obtained. The valuation fixed the annual value of the seventeen perches at 1*s.* and contained a note that the valuation was ascertained from the documents supplied and not from inspection of the lands.

Bolton, for the applicant:—

A claim for an injunction is not a cause of action, but a remedy: *Gillespie* v. *Willoughby* (1); *Ryan* v. *Burke* (2); *Martin* v. *Bannister* (3). This case is really an action of trespass, such as are brought every day in the County Court. It is the substance and not the form which is material: *Sullivan* v. *Orpen* (4); *Thornton* v. *M'Taggart* (5); *Oliver* v. *Kearney* (6).

Muldoon, for the plaintiffs:—

None of the cases cited touches this case. There is no jurisdiction to remit a primary suit for an injunction: *Boyle* v. *Masterson* (7). An injunction is the only remedy of any service to the plaintiffs. Further, there was no separate valuation at the time of the trespass The valuation subsequently obtained is not a proper one and merely

(1) 2 N. I. J. R. 221.
(2) 3 N. I. J. R. 53.
(3) 4 Q. B. D. 491.
(4) [1909] 1 I. R. 46.
(5) 44 I. L. T. R. 119.
(6) 43 I. L. T. R. 282.
(7) 25 L. R. I. 179.

Barton, J. 1912. MELVIN v. BALLINASLOE (No. 1) R. D. C.

ascertained in the Valuation Office in Dublin without inspection of the lands. No one but the occupier can obtain a separate valuation under the Valuation Acts: *Reilly* v. *Nugent* (1).

Bolton, in reply:—

Reilly v. *Nugent* (1) was decided before 40 & 41 Vict. c. 56. Section 31 lays down that the valuation may be established by any legal evidence.

BARTON, J.:—

This action, although in form an action for an injunction, is in substance an action of trespass, to which an injunction would be ancillary relief. I am of opinion that an action of that kind, if otherwise within the jurisdiction of the County Court, is capable of being remitted. If it appeared that the case was one in which a County Court decree would be ineffectual, or that the action was in the nature of a bill of peace, the Court would be very slow to remit. Whenever a plaintiff can show a sufficient reason for retaining a case in the High Courts, the Court can retain it, although the subject-matter may be intrinsically of little value. No sufficient ground is shown in the present case.

When the action was commenced, there was no separate valuation of the land in dispute. A separate valuation has been obtained by the defendant. It has been suggested that nobody can or ought to obtain a separate valuation, except the occupier. I can see no objection to a defendant obtaining a separate valuation for the purpose of an application to transfer. Under all the circumstances the costs of both parties, hitherto incurred, will be costs in the cause.

Solicitor for the defendants: *M. A. Hayden.*

Solicitor for the plaintiffs: *Patrick S. Golding.*

E. C. F.

(1) I. R. 9 C. L. 206.

IN THE MATTER OF THE ESTATE OF VALENTINE MARIE MARQUISE DE BOISÉ DE COURCENAY.

Wylie, J.
1912.
April 18.

Land Purchase Acts—Sale of settled lands negotiated by a firm of land agents, a member of which was a trustee under the settlement, with a power of sale—Negotiation fee—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 23 (12)—*Claim against purchase-money.*

Settled lands were sold by the tenant for life under the Land Purchase Acts. The sale was negotiated by A. and B., partners in a firm of land agents, pursuant to an agreement entered into with the vendor, under which they were to receive a negotiation fee, which it was admitted was to be divided equally between them. At the time of the negotiation of the sale A. was a trustee under the settlement, with a power of sale, but subsequently retired from the trust. There was no clause in the settlement enabling the trustees to charge for their services. On a question arising as to whether the claim should be allowed as against the purchase-money:—

Held, that the moiety of the fee payable to A. should not be allowed, but that the moiety payable to B. should, under the circumstances, be allowed.

QUESTION ARISING ON ALLOCATION.

The facts as stated by the Examiner were as follows:—The claimants of the negotiation fee, amounting to £122 13*s.* 7*d.*, were Messrs. Bridge and Atkinson. They were partners in a firm of land agents who had negotiated the sale prior to the 1st July, 1907, on which date the latest of the agreements was signed. They were employed to negotiate the sale by the vendor, who was tenant for life under the settlement. At the date of such negotiation, Mr. Atkinson was a trustee under the settlement, with a power of sale. He had been so appointed by deed of the 11th April, 1895, and continued to act as such trustee until the 9th February, 1909, when he retired from the trust. There was no clause in the settlement enabling professional trustees to charge for their services. It was admitted that, although the chief part of the work had been done by Mr. Bridge, his partner, Mr. Atkinson, was to get half the fee. The amount of the fee had

Wylie, J. 1912. *In re* DE COURCENAY'S ESTATE.

been sanctioned by the Estates Commissioners. The question raised by the Examiner was, whether the fee or any part of it could be paid out of the purchase-money?

W. M. Jellett, K.C., for the vendor, asked the Court to allow the full negotiation fee.

Hewitt Poole, for the claimants:—

The Court would be justified in allowing the fee. This is not the case of a trustee acting on behalf of himself and his co-trustee. Mr. Atkinson was only a bare trustee with a power of sale, and had no estate in the lands. In any case, Mr. Bridge is entitled to his share of the fee: *In re Doody* (1): and see general principle, stated by Lord Cranworth in *Broughton* v. *Broughton* (2), referred to in judgment of Stirling, J., at p 133.

WYLIE, J.:—

In this case the Examiner has raised the question as to whether a negotiation fee of £122 13*s.* 7*d.* sanctioned by the Estates Commissioners, or any part thereof, can be paid? The facts stated by the Examiner are as follows: [His Lordship stated the facts as above set out, and continued.] Now, in that state of facts, it would seem to me that, as to Mr. Atkinson's half of the fee, the law is perfectly clear. There are two well-settled rules of equity which, I think, govern the case: (*a*) a trustee will not be allowed to receive out of the trust property any remuneration for his personal services; and (*b*) the Court of Equity will not allow a trustee to put himself in a position in which his interest will conflict with his duty. In support of these rules, I need only refer to *In re Corsellis* (3), and *In re Doody* (1), where the authorities are fully discussed.

As to the first rule, it appears from the facts stated that, during all the time Mr. Atkinson was doing the work of negotiation, he was a trustee for the sale of the lands that were being sold. As so the second rule, his interest as negotiator was to get the largest fee he could. His duty as a trustee was to protect the trust estate from too large a fee. On both grounds it seems to me that Mr. Atkinson's claim must fail.

(1) [1893] 1 Ch. 129. (2) 5 D. M. & G. 160. (3) 34 Ch. D. 675.

As to Mr. Bridge's half of the fee, the question seems to me to be more difficult. Some of the cases would appear to go the length of deciding that, where a firm of which the trustee is a member does the work, the firm can make no claim unless there is an express stipulation that the trustee is to derive no benefit. But in order to meet the justice and merits of the case as regards Mr. Bridge, I think I am justified by the decision of Stirling, J., in *In re Doody* (1) in making an order for the payment of his share.

Solicitors for the claimants: *Baker, Ringwood, & Gordon.*
Solicitors for the vendor: *Moore, Keily, & Lloyd.*

J. E. W.

RICKERBY *v.* NICHOLSON.

Will—Gift—Charity—"Religious or charitable purposes"—Validity—"Fail or become void by reason of death within three months"—Failure of bequest for other reasons.

By her will, made three days before her death, a testatrix devised and bequeathed the residue of her property to N. upon trust, out of the rents and profits of her houses at D., to pay to B., the pastor of the Baptist Chapel, Harcourt Street, Dublin, or other the minister or pastor for the time being of said chapel, for a period of twenty-one years from the date of testatrix's death, an annuity of £25 per annum, to be applied by said B., or such other minister or pastor as aforesaid, "for such religious or charitable purposes" as he should think fit, and, in case the bequest should "fail or become void by reason of my death within a period of three months," the annuity of £25 was bequeathed to N. for his own use.

Held, that the bequest of the annuity to B. was a valid charitable gift, and that the gift over, in the events that happened, took effect.

Held also, that the gift over was a good gift, assuming that the bequest to B failed on the ground of uncertainty.

FURTHER CONSIDERATION.

Kathleen Hannah Kidd made her last will, dated 2nd March, 1905, and died on 5th March, 1905, without altering or revoking the said will.

By the said will the testatrix gave her house and property in

(1) [1898] 1 Ch. 129.

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Liffey Street, Dublin, to the defendant, Alexander Nicholson, for his own use absolutely, and as to the rest of her property, real and personal, she devised and bequeathed the same to the said Alexander Nicholson "upon trust as to my house No 1 Palace Terrace, Drumcondra, and my three houses at Donnybrook, to receive the rents and profits thereof, and after payment thereout of all head-rents, taxes, insurance premiums, expenses of making repairs, and other necessary outgoings, to retain as and for his commission on the collection of said rents 5 per cent. of the gross rental, and in the next place to pay to my mother during her life an annuity of £25 per annum, and, subject as aforesaid, and, in the next place, to pay out of said rents and profits to Hugh Brown, the pastor of the Baptist Chapel, Harcourt Street, Dublin, or other the minister or pastor for the time being of said chapel, for a period of twenty-one years from the date of my death, an annuity of £25 per annum, to be applied by said Hugh Brown, or such other minister or pastor as aforesaid, for such religious or charitable purposes as he shall think fit, and in case the bequest of said last-mentioned annuity shall fail or become void by reason of my death within a period of three months from the making of this will, then, and in that case, I bequeath an annuity of £25 per annum to the said Alexander Nicholson for a similar term of twenty-one years for his own use, absolutely charged upon said rents and profits before mentioned." Subject as aforesaid, the will gave bequests to the plaintiffs and others.

The action was brought for the administration of the personal estate of the deceased against the defendant as executor of the will. The questions arising on the construction of the will came before the Court on the further consideration of the chief clerk's certificate.

Jefferson, K.C. (with him *Bartley*), for the plaintiff:—

The bequest to Pastor Hugh Brown is void for uncertainty. The gift over to the defendant also fails, as it was only to arise if the former bequest became void, owing to testatrix's death within three months, under 7 & 8 Vict. c. 97, sect. 16. The bequest did not become void for that reason, but for uncertainty. The words in the present will, "religious or charitable," are almost

identical with the words "charitable or religious," which were the words in *Grimond* v. *Grimond* (1), where the bequest was held void for uncertainty. *Grimond* v. *Grimond* (1) was followed in the most recent case, *Clarke* v. *Church of England Collegiate School of St. Peter* (2). Where the gift includes purposes which may not be charitable, the whole gift fails for uncertainty: *Hunter* v. *Attorney-General* (3); *In re Davidson*, *Minty* v. *Bourne* (4). The case of *Rea* v. *Crozier* (5) is distinguishable, as that case was decided on other words contained in the will.

John Leech, K.C. (with him *B. Meade*), for the defendant:—

Grimond v. *Grimond* (1) is not to be taken as overruling the previous authorities or altering the law: *In re Pardoe* (6). Further, it is a Scotch case, and is not binding in England and Ireland. The law in England differs from the Scotch law owing to the statute of Elizabeth. *Dick* v. *Audsley* (7) is a Scotch case, and in effect dissents from *Grimond's Case* (1).

In *Clarke* v. *Church of England Collegiate School of St. Peter* (2) it was merely held that a public purpose is not equivalent to a charitable purpose. The gift in *Hunter* v. *Attorney-General* (3) was partly bad, and therefore the whole failed.

B. Meade:—

In England and Ireland a gift for a religious purpose is *prima facie* a charitable gift: *White* v. *White* (8). A gift for religious and charitable purposes is good: *Baker* v. *Sutton* (9). Therefore, the whole argument on the other side must rest on the word "or." A gift "for religious purposes" is good. In *Grimond* v. *Grimond* (1) the words were "charitable or religious," which were interpreted to mean "charitable or other religious." The words here are "religious or charitable"; and if that means "religious or other charitable," the gift is good.

(1) [1905] A. C. 124.
(2) [1912] 1 Ch. 337.
(3) [1899] A. C. 309.
(4) [1909] 1 Ch. 567.
(5) [1911] 1 I. R. 289.
(6) [1906] 2 Ch. 184.
(7) [1908] A. C. 347.
(8) [1893] 2 Ch. 41.
(9) 1 Keen, 224.

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Bartley, in reply :—

If *Grimond* v. *Grimond* (1) applies in England and Ireland, there is an end of the case. In the introduction to the last edition of Theobald on Wills it is expressly laid down that *Grimond* v. *Grimond* (1) was not decided on any ground of law peculiar to Scotland, but simply on the meaning of an English word. The only difference between English and Scotch law, if there is any, is this, that in England "religious" is *prima facie* "charitable"; in Scotland it is not: see *Arnott* v. *Arnott* (2). But the presumption may be rebutted. Where a testator uses the expression "charitable or religious" by "religious" he must mean something other than charitable: *Blair* v. *Duncan* (3). In *Arnott's Case* (2) the Master of the Rolls recognizes this distinction, and states that it is where the word "religious" stands alone it is construed to mean charitable. In *Arnott's Case* (2) the testator referred back to other gifts admittedly charitable, and the decision in that case was grounded on the whole context of the will. The testator here contrasts religious and charitable, and, therefore, the presumption that the gift is *prima facie* charitable, as laid down in *White* v. *White* (4), is rebutted.

May 13.

Ross, J. :—

The point in dispute arises on further consideration of the chief clerk's certificate. The testatrix, Kathleen Kidd, after certain bequests and devises in her will, dated 2nd March, 1905, directed her executor and trustee to pay out of certain rents to Hugh Brown, the pastor of the Baptist Chapel, Harcourt Street, or other the pastor or minister for the time being of the said chapel, for a period of twenty-one years an annuity of £25. She then continues, "to be applied by the said Hugh Brown, or such other minister or pastor as aforesaid, for such religious or charitable purposes as he shall think fit, and in case the bequest of said last-mentioned annuity shall fail or become void by reason of my death within a period of three months from the making of this my will, then and in that case I bequeath an annuity of £25 per annum

(1) [1905] A. C. 124.
(2) [1906] 1 I. R. 127.
(3) [1902] A. C. 37.
(4) [1893] 2 Ch. 41.

to the said Alexander Nicholson for a similar term of twenty-one years for his own use absolutely, charged upon said rents and profits before mentioned."

The testatrix died on 5th March, 1905, three days after the date of her will, and the annuity became void. Mr. Nicholson, the executor, has since received the £25 annuity provided for him by the will, and has paid it over to Pastor Hugh Brown. This naturally raised a suspicion of a secret trust.

After the cross-examination of Mr. Nicholson, it was plain that there was no secret trust, and counsel for the plaintiff have taken up a new position.

They contend that the only event in which Mr. Nicholson was to take his annuity is that the bequest to Hugh Brown should become void by reason of the death of the testatrix within three months from the making of the will—that it became void for another reason, namely, for uncertainty, and therefore the only event in which Alexander Nicholson was to take has not occurred.

In the first place, there is no grammatical or other reason why the words "by reason of my death within three months" should be connected with the word "fail." They must be connected with the word "void." To connect them with the word "fail" is unnecessary. It deprives the word "fail" of any meaning different from the words "become void."

In construing a will we must, if possible, give a meaning to every word used. If the word "fail" is to be taken as having any meaning of its own, the plaintiff's contention comes to the ground.

Next we have to consider—Is the bequest to Hugh Brown void for uncertainty? If the expression used had been for such "charitable purposes" as he should think just, there could be no doubt. According to our law a charitable bequest never fails for uncertainty.

If the expression used had been "for such religious purposes as he should think fit," there could be no doubt, because according to our law a bequest for a religious purpose is *prima facie* charitable.

But it is contended that when both words are used and

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connected by the word "or," the gift must fail; that the use of the word "charitable" shows that the word "religious" means something distinct from charitable; and that, as this would permit Mr. Brown to apply the whole or part of the money to purposes not charitable, the whole gift must fail.

The plaintiff's contention rests on *Grimond* v. *Grimond* (1), where the words used are "charitable or religious institutions and societies." The House of Lords held the bequest void for uncertainty.

But the decision is on the Scotch Law, and it has been many times pointed out that the expression "charitable purposes," mainly in consequence of the Elizabethan Statute, has a much wider meaning in England than in Scotland. The word "or" does not necessarily imply that an alternative is given to the legatee. It may of course connect alternative objects on which the legatee may expend the sum bequeathed, but not necessarily. It is often used by the best English authors, not to connect real alternatives, but merely to connect different words expressing the same or a cognate idea, as, for instance, where Carlyle talks of "the pale rim or sickle of the moon which once was full."

Several English Judges in commenting on the Scotch decision have pointed out that it could never have been intended to overrule a long series of English cases.

I agree with the reasoning of Mr. Justice Barton in *Rea* v. *Crozier* (2), which is altogether inconsistent with the plaintiff's contention here.

I therefore hold the gift of this annuity to the defendant to be valid.

Solicitors for the plaintiff: *Hanmore & Co.*
Solicitors for the defendant: *Hardman & Son.*

D. M. S.

(1) [1905] A. C. 124.

(2) [1911] 1 I. R. 289.

EDWARD DOHERTY *v.* FREDERICK H. KENNEDY, WILLIAM FINDLATER, AND THE DUBLIN CITY DISTILLERY COMPANY, LIMITED.

(1909. No. 1145.)

Barton, J.
1911.
Jan. 27.
Feb. 1, 2, 3.
March 29.

Appeal.
1912.
Feb. 16, 19, 20, 22, 23.
May 17.

Company—Debentures—Pledge—Priority—Validity of pledge—Constructive delivery—Warrant—Bill of sale—Registration—Companies Act, 1900, *sect.* 14—*Bills of Sale (Ireland) Act*, 1879, *sect.* 4.

A distillery company, with power to create debentures and to borrow on mortgage, having issued a first series of debentures, proceeded to issue a second series of debentures, which provided that, although nothing therein contained should be taken to authorize the creation of any mortgage or charge on the property of the company in priority to such debentures, the company might by delivery warrants or other means pledge to their bankers or others their manufactured whiskey, to secure advances for the purposes of the company's business. The plaintiff advanced moneys to the company on the security of their manufactured whiskey lying in the bonded warehouse of the company as follows:—On the occasion of each advance the name of the plaintiff was entered in the company's stock-book opposite the particulars of whiskey intended to be pledged, and a delivery warrant and invoice, each containing particulars of such whiskey, were delivered to the plaintiff. The assets of the company, including the whiskey pledged to the plaintiff, were realized by the receiver appointed in an action brought on behalf of the first debenture-holders of the company, and proved insufficient to pay the plaintiff's claim and those of the second debenture-holders in full. In an action brought by the plaintiff against the trustees for the second debenture-holders, and the company:

Held, by the Court of Appeal (the Lord Chancellor and Holmes, L.J., affirming Barton, J.; Cherry, L.J., dissenting), (1) that the agreement to pledge, followed by the transfer of specific whiskey into the plaintiff's name in the books of the company, effected a valid pledge of the whiskey so transferred, independently of the warrants; and that the plaintiff was entitled to the security so obtained in priority to the second debenture-holders; (2) that the warrants delivered to the plaintiff did not require registration as bills of sale under section 14 (*c*) of the Companies Act, 1900,

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and s. 4 of the Bills of Sale (Ireland) Act, 1879. *Per* Holmes, L.J., that the warrants came within the class of documents excluded from section 4 of the Bills of Sale (Ireland) Act, 1879, as being "documents used in the ordinary course of business as proof of the possession or control of goods."

Held, by Cherry, L.J., that the transactions between the plaintiff and the company amounted to mortgages of the whiskey, and not pledges; that there was no constructive delivery of possession of the whiskey to the plaintiff; and that the warrants required registration as bills of sale.

This action (omitting certain claims not material for the purposes of this report) was brought by the plaintiff, seeking a declaration that he had become entitled to a good and valid pledge on certain whiskies which had been sold in the course of the liquidation of the defendant company, in priority to the holders of the second debentures of the company, and for consequential relief.

The company was incorporated in the year 1890 under the Companies Acts, 1862 to 1886, for the purpose of carrying on the business of whiskey distillers at Dublin and elsewhere; and by its memorandum of association it was empowered to borrow money secured by mortgage or debentures charged on all or any of the property of the company. In September, 1890, the company raised the sum of £35,000 by the issue of a first series of 350 debentures (1). In November, 1895, the company raised a further sum of £25,000, by a second series of debentures, which were subject (*inter alia*) to the following conditions:—"Nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the property for the time being of the company in priority to the charge hereby created, with this exception, that the company may, from time to time, pledge to their bankers, or others, by delivery warrants or other means, their manufactured whiskey, and the barrels and vessels containing the same, to secure an advance or advances for the purposes of the company's business."

In the course of its business the company borrowed from its bankers considerable sums of money, portion of which, amounting to

(1) The form of these debentures is stated in *Cox* v. *Dublin City Distillery Co.* ([1906] 1 I. R. at p. 447), and they were admitted to take priority over the plaintiff's claim.

£2000, was secured to the bank by the joint and several guarantee of the plaintiff (who was a director of the company) and others; and the plaintiff was compelled to pay on foot of his guarantee, and otherwise advanced to the company, in the years 1905–1908 sums amounting to upwards of £2550, which advances were secured in the following way:—The company held a large stock of manufactured whiskey in numbered casks in its Dublin bonded warehouse, one keg of which was in the custody of the Excise authorities. A record of this whiskey was kept in the company's stock-book, containing particulars of the whiskey, the number of the warrant, the number of the cask, and the amount of the whiskey, &c. On the occasion of each advance made by the plaintiff, the company purported to pledge certain casks of whiskey as a security for the advance by entering the name of the pledgee in pencil in the stock-book, opposite the particulars of the whiskey pledged; the transaction was further recorded in a second book called "the register of mortgages," in which particulars of the pledged whiskey were set out, with the names of the pledgees.

At the same time a delivery warrant was handed to the pledgee, which was in the following form:—

"Warrant No. } GREAT BRUNSWICK STREET, (Stamp.)
"Dated } DUBLIN.

"No.

"Warrant for Butts and Hhds. D. C. D. Pot Still Whiskey, bonded May, 1901, and March, 1903, as per particulars underneath. Deliverable to Edward Doherty, Esq., Dublin, or assigns by endorsement hereon, on payment of rent from , and all other charges from date hereof.

"Free storage.

(Then followed full particulars of the whiskey pledged.)

"The Dublin City Distillery, Ltd.

"(Great Brunswick Street, Dublin).

"Entered

"A B., ler . A. J. W. HORNE, Secretary."

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An ordinary trade invoice, containing full particulars of the whiskey being dealt with, was also delivered to the pledgee, and, nothing further was done by way of physical delivery of possession of the whiskey. No intimation of the pledges was given to the Excise authorities, and a certain delivery order on a yellow form, which, in the routine of the Customs Office, it was usual to fill up, on removal of whiskey from the bonded warehouse after payment of duty, was never used on the occasion of these pledges.

On the occasion of actual sales of the pledged whiskey by the company, the warrants held by the plaintiff, and affecting the whiskey sold, were delivered up to be cancelled, and thereupon new whiskey was pledged to the plaintiff in the same manner as before, a new warrant and invoice being delivered to him.

On the 15th July, 1905, the defendant company passed a resolution to wind up, and the assets of the company were realized by the receiver in the action of *Cox* v. *Dublin City Distillery Company* (1), to whom the plaintiff had handed the warrants of the whiskies pledged to him without prejudice to his own rights. The assets proved more than sufficient to satisfy the claims of the first debenture-holders and of the plaintiff, but were insufficient (after payment of the first debenture-holders) to pay the claims of the plaintiff and of the second debenture-holders and other creditors of the company. The present action was brought by the plaintiff on the 6th day of December, 1909, against the two first-named defendants as trustees for the second debenture-holders in the company, and the liquidator of the company, who defended in the company's name.

The defendants pleaded that the transactions between the plaintiff and the company did not constitute a good and valid pledge or charge of the whiskey of the company, inasmuch as they did not contain the essentials of a common law pledge; that they did not constitute a charge at all, and that if such transactions amounted to a charge or pledge they were rendered void by

(1) [1906] I I. R. 446.

reason of not having been registered pursuant to the Companies Act, 1900 (1).

The action was tried before Mr. Justice Barton, who gave judgment on the 29th March, 1911.

The arguments were substantially the same as in the Court of Appeal.

(1) Section 14 of the Companies Act, 1900, is as follows :—

Every mortgage or charge created by a company after the commencement of this Act and being either—

(*a*) A mortgage or charge for the purpose of securing any issue of debentures ; or

(*b*) A mortgage or charge on uncalled capital of the company ; or

(*c*) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale ; or

(*d*) A floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured.

Section 4 of the Bills of Sale Act, 1878 (to which section 4 of the Bills of Sale (Ireland) Act, 1879, corresponds), is as follows :—

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall he conferred, but shall not include the following documents: that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel, or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

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BARTON, J.:—

[His Lordship dealt with certain matters not material for the purposes of this report, and continued]—

This brings me to the consideration of the third and most important branch of plaintiff's claim, which occupied the greater part of the trial and of the arguments. This claim relates to advances of upwards of £2000 which plaintiff made from time to time to the company. Plaintiff claims that the company pledged to him, as security for these advances, certain specific manufactured whiskies of the company, by transferring casks, which contained them, into his name in their books, and giving to him invoices of the goods and delivery warrants of the specific whiskies. The warrants and the casks are identified by numbers, and are set forth in a schedule to the statement of claim. They represent upwards of 20,000 gallons of whiskey. The plaintiff claims a declaration that he is entitled to a good and valid pledge on the whiskies contained in these several warrants, and that such pledge takes priority of the second debenture-holders.

The explanation of the mode and form in which this security was given is to be found in one of the conditions to which the second debentures of the company were subject. It is necessary to pay special attention to this condition; because it is clear that the plaintiff's security was given to, and received by, him with special reference to that condition. It is the fourth condition, and runs as follows:—"Nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the property for the time being of the company in priority to the charge hereby created, *with this exception, that the company may from time to time pledge to their bankers, or others, by delivery warrants or other means, their manufactured whiskey, and the barrels and vessels containing the same, to secure an advance or advances for the purposes of the company's business.*"

This fourth condition of the second debenture was the starting-point of the transactions with which we are now concerned; and the inference which I draw from the evidence and the documents, as regards the character and nature of those transactions, is to the following effect:—The company from time to time applied to the plaintiff for advances. He required, as security, the particular

kind of security which would give him priority over the second debenture-holders, namely, a pledge of manufactured whiskies of the company, by means of delivery warrants or other means. The company assented and agreed to pledge the whiskies to him, and to give him delivery warrants of them. In pursuance of this agreement, they in each instance entered his name in their books as transferee of the specific casks of the manufactured whiskies which were lying in their bonded warehouse. They also handed to him invoices referring to the specific casks and their contents, and delivery warrants which were in the following form, which may be taken as an example—

"WARRANT.

"No. (3063).

"GREAT BRUNSWICK STREET,

"DUBLIN, *9th May*, 1904.

"Warrant for 15 Hhds. Pot Still Whiskey, bonded December, 1903, as per particulars underneath.

"Deliverable to Edward Doherty, or assigns, by endorsement hereon, on payment of rent from , and all other charges from date hereof.

"(Then follow particulars of mark, number of casks, contents, ullage, strength.)

"The Dublin City Distillery, Limited

"(Great Brunswick Street, Dublin),

"ALFRED JOHN HORNE, Secretary.

"Entered,

"John J. Clerk."

I have no doubt that these entries were made in the books of the company, and that these invoices and delivery warrants were handed to plaintiff, with the intention of carrying out the agreement to give him the security which he required, namely, a valid pledge by delivery warrants or other means, as contemplated by the fourth condition of the second debentures. The delivery warrants did not *per se* constitute the pledge, and were not essential to it. The pledge was complete when there was an agreement to pledge followed by transfer of the specific whiskey into plaintiff's name and the furnishing to him of the invoices of the goods pledged to him. That was quite enough to constitute a pledge, and to make the possession of the company

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constructive possession of plaintiff. The delivery warrants were added, as evidence of the pledgee's constructive possession, and his right to actual possession. As proof of his right to actual possession, they strengthened his title, and gave him a security in the particular form which was contemplated by the fourth condition of the second debentures.

It is well settled that a vendor or pledgor can, by agreement, constitute himself the warehouseman or bailee for the vendee or pledgee. In *Reeves* v. *Capper* (1), Captain W. pledged his chronometer to Messrs. Capper, in consideration, *inter alia*, of his being allowed to use it during a voyage. The Court held that the possession of Captain W. was still the possession of Messrs. Capper. In *Marvin* v. *Wallis* (2) Crompton, J., after holding that the possession of the vendor in that case was the possession of the vendee, went on to say: "The case is analogous to that of goods warehoused. I go to the warehouseman with the seller and say to him, 'You now hold these goods for me'; the warehouseman then becomes bailor of the purchaser, and the possession of the warehouseman becomes the possession of the purchaser." In *Martin* v. *Reid* (3) some chattels were left in the possession of a pledgor by arrangement with the pledgee, who had no convenient place for them. The Court held that, by virtue of an agreement and of the facts proved in evidence, there was a constructive delivery of the chattels, and that the possession of the pledgor became the possession of the pledgee. Erle, C.J., in the course of his judgment, remarked that "in many instances the warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intention of the parties." In *Meyerstein* v. *Barber* (4) Willes, J., referred to *Reeves* v. *Capper* (1) and *Martin* v. *Reid* (3), and observed that "the property in the goods may pass even though they remain in the possession of the pledgor, provided they do so by virtue of a contract between the parties which makes the custody of the pledgor the custody of the pledgee."

The present case is comparatively free from difficulty, because

(1) 5 Bing. N. C. 136.
(2) 6 E. & B. 726, 735.
(3) 11 C. B. (N. S.) 730.
(4) L. R. 2 C. P. 38, 52.

it is a simple case between pledgor and pledgee, between the original parties to the contract of pledge and the original giver and receiver of the delivery warrant. This is not a case of vendor's lien or of reputed ownership, where it sometimes happens that constructive possession may be insufficient, in the absence of proof of trade custom, to displace or defeat certain well-established rules and doctrines of our law. No question of attornment arises between the original parties to a delivery warrant (as distinguished from a delivery order), because the warrant imports the recognition and assent of the bailee to the bailor's right to possession. In the case of a delivery order, or of a warrant, which had been indorsed to a third party, attornment would be necessary to change possession; but no such question arises between the original parties to a delivery warrant. Furthermore, no question of a "document of title" arises in a case between the original parties to a delivery warrant like this. If the warrant had been indorsed, it might have been material that a delivery warrant of this kind is not, apart from statutes which do not apply in this case, a document of title in the sense that a bill of lading is. The case is, in fact, a singularly simple one, in my opinion.

If I am right in the views which I have hitherto expressed, it follows that the Bills of Sale Act has nothing to do with this case. Once it is established that the transaction was intended to operate as a pledge, and that the delivery warrant was given as a proof of constructive possession and of the right to actually receive the pledged goods, the Bills of Sale Acts cease to apply. Those Acts are directed against documents, not against transactions. They do not include cases where the object and effect of the transaction was immediately to transfer the constructive possession from the grantor to the grantee, and the document is only proof of that transfer, given in pursuance of a contract or pledge. Mr. Brown argued that this warrant was a licence to seize or take possession. But that cannot be, if constructive possession was given by the pledge. It is impossible to seize or take possession of that which one has already got possession of: *Ex parte Hubbard* (1). The warrant recognized the right of a person, already in constructive possession

(1) 17 Q. B. D. 690.

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of goods, to actually receive them; and it is within the exception contained in section 4 of our Irish Bills of Sale Act, 1879, which provides that the expression "bill of sale . . . shall not include the following documents; that is to say, . . . warehouse-keeper's certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented." This document is not a delivery order, but nearly all the rest of the provisions apply to it.

The words "used in the ordinary course of business" present no difficulty. Reference was made to *Tennant* v. *Howatson* (1), where the Privy Council had before it a very special agreement from the Colony of Trinidad, and held that the words "transfer of goods in the ordinary course of business," in a local ordinance, analogous to our Bills of Sale Act, did not point to the borrowing of money on mortgage or special agreement. But we are not here concerned with those words, nor with the borrowing of money on mortgages or special agreement, but with a pledge carried out by one of the most familiar documents in the whole range of commercial practice and law, namely, a warehouseman's certificate in the form of a warrant. In *In re Hamilton, Young, & Co., Ex parte Carter* (2), Bigham, J., Vaughan-Williams, L.J., and Cozens-Hardy, L.J., had no difficulty in holding a letter of lien sent by Liverpool traders to a Calcutta banker with bleachers' receipt was a "transfer of goods in the ordinary course of business of a trade and calling," and also was "used in the ordinary course of business as proof of the control of goods." There was no evidence of commercial usage. The Court relied upon their ordinary knowledge of mercantile dealings and commercial law. In the present case there is less difficulty. The letter of lien in that case was a well-known mercantile document; but it was a *rara avis* compared to a warehouseman's warrant. The Law Reports teem with cases in which these documents occur. There are few documents so universally used wherever dockers, wharfingers, or other warehousemen are concerned. They are

(1) 13 App. Cas. 489. (2) [1905] 2 K. B. 381, 772.

actually named in the Bills of Sale Act, and there can be no difficulty in their case, as to their use, and the purpose of their use, in the ordinary course of business.

For all these reasons, I have no doubt that the plaintiff is entitled to the declaration which he seeks. The transaction resembles the transaction of which FitzGibbon, L.J., said in *Cox* v. *Dublin City Distillery Co.* (1) :—"The transaction with the bank I treat as a pledge—a legal transfer of the property, and symbolically of the possession, by handing over the warrants to the pledgees. The custody of the whiskey, and the access to it, were complicated by its being in bond, and inside the gates of the company's premises. But I regard the dealing as a complete legal pledge, given as a security for a debt, and creating a charge practically not distinguishable, either in effect or incidents, from a charge created by mortgage."

The defendants' case rested upon two hypotheses, both, in my opinion, fallacious. In the first place, they assumed that the King or His Majesty's Customs Officers constituted the warehousemen in this case. That is not so. This was a distiller's warehouse, so styled by statute. The provision of the Spirits Act, 1880, seems to recognize that a distiller's warehouse is what its name indicates, and that the distiller is the warehouseman, although the Customs officials have whatever custody and control is necessary for the purpose of collection of duties. The Customs officer was compared by defendants' counsel to the sheriff in *Charlesworth* v. *Mills* (2). The Customs officer, in a distiller's warehouse of this kind, resembles the sheriff, in being "a man in the house," but not in being "a man in possession."

The second fallacious hypothesis, upon which defendants' case rested, was that the delivery warrant, which was availed of in this case, was in the nature of a delivery order, and that the test to be applied to it was whether it would be an effective delivery order, if presented to these supposed warehousemen. But the delivery warrant is not, and does not purport to be, a delivery order, or to be addressed to a warehouseman; it is a wholly different document, of every-day occurrence in commercial transactions, namely, a warrant for goods issued by a warehouseman.

(1) [1906] 1 I. R. 488, at p. 458. (2) [1892] A. C. 231.

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In Benjamin on Sales, the distinction between a delivery order and a delivery warrant is referred to in several places. At p. 742 n. it is noted that the term "delivery order" is constantly misapplied to such documents as warrants, and that "a delivery order" is an order upon the warehouseman to deliver the goods to the vendee. . . . A warrant is a document issued by the bailor himself." At p. 832 n. he gives an example of this misapplication of terms, by pointing out that the document, which in *Townley* v. *Crump* (1) is called a "delivery order," is properly called a warehouse-keeper's certificate, and is in the nature of a warrant. Again, at p. 846, he refers to a delivery order as an order "given by the seller on a bailee who holds possession as agent of the seller . . . . A warrant is a document issued by a wharfinger, dock-owner, or warehouseman, stating that certain goods therein mentioned are deliverable to a person therein named, or his assigns, by indorsement." Again, at p. 858, he points out that, when a wharfinger's certificate purports to be a delivery warrant, making the goods deliverable to A. B., or his assigns, by indorsement or otherwise, the warrant represents the goods and is used as proof of the possession or control of them; and he distinguishes a document of that kind from a mere certificate that goods are lying ready for delivery, as in *Gunn* v. *Bolckow* (2), which could in no sense represent the goods, or be capable of being regarded as proof of control and possession.

The same distinction is drawn in more detail in a useful little book, quoted by Benjamin, Butterworth's Bankers' Advances on Mercantile Securities other than Bills of Exchange and Promissory Notes (3). It is the only text-book, so far as I know, which directly deals with the matter. In the preface (p. 4), the author claims to have "endeavoured to elucidate certain points of very considerable difficulty, upon which insufficient light seems to be thrown by the recognized text-books, such as the important consequence of the distinction between the delivery orders and warrants." It is pointed out by both Benjamin and Butterworth that in some reported cases of high authority, e.g., *Townley* v. *Crump* (1),

(1) 4 Ad. & Ell. 58.
(2) L. R. 10 Ch. App. 491.
(3) 1st Edition, 1901.

Gunn v. *Bolckow* (1), and *Inglis* v. *Robertson* (2), some inexactitude of language occurs in the judgments from failing to recognize this distinction. Special reference may be made to pp. 29–34 of Butterworth's book, where definitions and forms are given of delivery orders, dock warrants, warehousemen's certificates, and all other commercial documents which are treated as documents of title in the Factors Act and Sale of Goods Act, and are excepted from the Bills of Sale Act.

The Law Reports are full of cases in which warrants in this form, issued by dock companies, wharfingers, and other warehousemen, are the subject of reference or decision.

I select at random a few references which illustrate the relation of these documents to the contract of pledge, and the distinction between delivery warrants and delivery orders, in a case like the present.

In *Reg.* v. *Morrison* (3) a pawnbroker's ticket was held to be a warrant for the delivery of goods within the meaning of a criminal statute. Crompton, J., in the course of his judgment observed that instruments of this nature were treated as warrants in the course of commercial transactions, and were given to parties warehousing goods as warrants in the hands of the original depositor or of parties to whom he disposed of it. In *Imperial Bank* v. *London & St. Katherine's Docks Company* (4), Jessel, M.R., pointed out that one course open to the holder of a delivery order was to get his name entered in the warehousemen's books, and in addition to get a warrant showing his title and enabling him to confer a title by indorsement. In *Farina* v. *Home* (5), the wharfinger's warrant was in this form. The case was concerned with the position of an indorsee, and has no bearing upon the present case. But Parke, B., said at p. 123, that as between the original parties to the warrant—the wharfinger and the consignee of the goods—the possession of the wharfinger is the possession of the consignee. In *Barber* v. *Meyerstein* (6), Lord Hatherley, at p. 329, speaks of a warrant for delivery as

(1) L. R. 10 Ch. App. 491.
(2) [1898] A. C. 616.
(3) 28 L. J. Mag. Cas. (N. S.), 210.
(4) 5 Ch. Div. 195.
(5) 16 M. & W. 119.
(6) L. R. 4 H. L. 317.

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being "issued," and an order for delivery being "accepted," by the warehouseman—which clearly points to the distinction to which I have referred. The distinction is also alluded to in Mr. Justice Scrutton's book on Charterparties and Bills of Lading, 6th ed., pp. 169–170.

Reference may also be made to the Stamp Act, 1870, sections 87–92, and the Stamp Act, 1891. In the latter Act delivery orders, which bear a 1*d.* stamp, are defined by section 69 ; (i), whole warrants of goods, which bear a 3*d.* stamp, are defined by section 111 (i). The present document answers the latter description and is properly stamped as a warrant ; not as a delivery order.

Many cases might be referred to in which these warrants, issued by dock-owners, wharfingers, and other warehousemen, have cropped up in commercial cases. Their legal effect is, I think, correctly given by Butterworth in his book, already referred to, at p. 37. Apart from the Factors Act, and Sale of Goods Act, and certain private Acts regulating the London sufferance Wharfingers, and other Warehousemen's Acts, the existence of which must be borne in mind when reference is made to cases relating to London docks and wharves, such as *Barber* v. *Meyerstein* (1), these documents are not documents of title in the same sense that Bills of Lading are. They are merely tokens of an authority to receive possession, *i.e.* actual possession. The effect of the indorsement of a warrant is that an indorsee does not obtain possession until he lodges the warrant with the bailee. In that respect the indorsee of the warrant is like the person to whom a delivery order is given. In the meantime the constructive possession of the person to whom the warrant is addressed continues, and the bailee holds for him.

I cannot help suspecting that the confusion of thought which, I respectfully think, underlay the defendants' case upon this branch of it was partly, if not mainly, attributable to the discovery of a yellow form used in the routine of the Customs office, and adopting in some respects the form of a delivery order. This form was filled up by persons taking whiskey out of the bonded

(1) L. R. 4 H. L. 317.

warehouse—whether by the company itself, a purchaser, or a pledgee. It was, I have no doubt, a useful piece of, I will not say red tape, but rather office machinery. But it has no real relation to the documents known to mercantile law and usage as delivery order or delivery warrants.

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The plaintiff will be entitled to the declarations asked for in paragraphs 3 and 4 of the prayer of his claim; and to the limited relief already referred to in respect of paragraph 5. The action will be dismissed so far as paragraphs 1 and 2 are concerned. Plaintiff will have his costs of the action, save in so far as they have been increased by the claim for relief contained in paragraphs 1 and 2 of the statement of claim; as regards which the defendants will have their costs set off against the plaintiff's costs.

R. W. L.

The defendants appealed from this decision (1).

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Feb. 16, 19, 20, 22, 23.
May 17.

Serjeant Matheson, K.C., S. L. Brown, K.C., and *A. A. Dickie,* for the appellants:—

We contend that the transactions between the plaintiff and the company did not effect any valid pledges of the whiskey. Barton, J., dealt with the case on the basis that there was an underlying agreement by the company to pledge the whiskey, but there is no evidence of any such agreement, and no resolution of the company to that effect is in evidence. The case depends upon the documents, and upon them alone. The essence of a pledge is wanting here, namely, the delivery of the goods to the pledgee. An authority to take possession is not enough: see judgment of Lord Esher, M.R., in *Ex parte Hubbard* (2); nor is a mere contract to pledge: *Meyerstein* v. *Barber* (3). In this case not only was the whiskey not delivered to the plaintiff, but the company was not in a position to deliver it; it was under the custody of the Excise authorities, and payment of the duty would have been required before delivery. No doubt in some cases symbolical delivery has been held sufficient

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and HOLMES and CHERRY, L.JJ.

(2) 17 Q. B. D. 690.

(3) L. R. 2 C. P. 38 at 51.

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to support a pledge, but never under circumstances like the present, where the whiskey was, and remained, in the possession of the supposed pledgors; there must be an independent third person who can become bailee or warehouseman for the pledgee: *Anderson* v. *M'Call* (1). Thus in *Meyerstein* v. *Barber* (2), where it was held that a valid pledge of cotton was created by a deposit of the bill of lading with a lender, the cotton was in possession of a wharfinger: *Ex parte Close* (3); *Grigg* v. *National Guardian Assurance Co.* (4); and *In re Cunningham & Co., Ltd.* (5), can be similarly distinguished.

Here the documents are inconsistent with a pledge, in the case of which the pledgee acquires a special property only in the goods pledged and where possession passes to him; the documents point to an out-and-out sale of the whiskey, in which the entire property passed to the plaintiff, although the possession remained with the so-called pledgors. The invoice and warrant were documents of sale and nothing else, and so far from possession passing, the warrants show that the whiskey was "deliverable" to the plaintiff or his assigns. The words "free storage" also point to the intention that the whiskey should remain in the possession of the company. That being so, it is clear that the invoices and warrants, or at least the warrants, were documents which, if they had been executed by an individual, would have required registration as bills of sale under section 4 of the Bills of Sale (Ir.) Act, 1879, and accordingly, under section 14 of the Companies Act, 1900, they are inoperative as against the liquidator and the creditors of the company, by reason of non-registration within twenty-one days of their creation. To hold otherwise would open the door to the very abuses against which the Bills of Sale Act was directed; a company might obtain credit on the strength of its possession of large quantities of whiskey, every cask of which was pledged—a fact which could not be known to those dealing with the company. *Charlesworth* v. *Mills* (6) will be relied upon by respondent's counsel, but the

(1) 4 Macph. 765.
(2) L. R. 2 C. P. 38.
(3) 14 Q. B. D. 386.
(4) [1891] 3 Ch. 206.
(5) 28 Ch. D. 682.
(6) [1892] A. C. 231.

document there in question was only intended to evidence a transaction which was already completed; here the plaintiff must rely on the invoices and warrants to establish his title. It cannot be said that these documents come within the exceptions mentioned in section 4 of the Bills of Sale (Ir.) Act, 1879; they were not used "in the ordinary course of business" of the company. The borrowing of money on the security of its manufactured whiskey is no part of the business of a distillery company: *Tennant* v. *Howatson* (1). In *Cox* v. *Dublin City Distillery Co.* (2) the validity of the pledges was not at issue.

[*Reeves* v. *Capper* (3), *Marvin* v. *Wallis* (4), and *Martin* v. *Reid* (5), were also cited and discussed.]

The Attorney-General (*The Right Hon. C. A. O'Connor, K.C.*), *Herbert Wilson, K.C.*, and *J. Walker Doherty*, for the respondent:—

The warehouse in which this whiskey lay was not a Crown warehouse under section 54 of the Spirits Act, 1880, but the distillers' own warehouse authorized by section 49 of that Act, where the distillers had the custody of their whiskey; it was, no doubt, watched by the Excise authorities to ensure the payment of duty, but there was no possession in the Excise, and it was quite competent for the company to create valid pledges of the whiskey: *Pearson* v. *Dawson* (6). We do not dispute that delivery is essential to a pledge, but constructive or symbolical delivery is sufficient: Story's Law of Bailments, section 297. Here, from the nature of the case, actual delivery of the whiskey was impossible; it is absurd to suggest that the plaintiff should have paid the duty on the whiskey being dealt with, taken delivery of it, and then deposited it again with the company to hold as bailee for him. The agreement to pledge, followed by the transfer of the specific casks of whiskey to the plaintiff in the books of the company, was sufficient; the invoices and warrants were never intended to, and did not, effect a sale of the whiskey, nor did they create the

(1) 13 App. Cas. 489, at 494.
(2) [1906] 1 I. R. 446.
(3) 5 Bing. N. C. 136.
(4) 6 E. & B. 726.
(5) 11 C. B. (N. S.) 730.
(6) E. B. & E. 448.

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pledges; they were merely intended to be evidence of the capacity in which the company held the whiskey as bailees for the plaintiff. In the first *Bushmills Case* (1) the question was: "Sale or pledge?" but the validity of a constructive pledge of whiskey was never questioned either there or in the second *Bushmills Case* (2), while in *Cox* v. *Dublin Distillery Co.* (3) the decision of the Court of Appeal was based on the assumption that, under circumstances similar to the present, there had been a valid pledge of the whiskey. FitzGibbon, L.J., there said: "The transaction with the bank I treat as a *pledge*—a legal transfer of the property and symbolically of the possession, by handing over the warrants to the pledgees." That decision disposes of the present contention. As to the sufficiency of the delivery we rely on *Reeves* v. *Capper* (4). See also *Castle* v. *Sworder* (5); *Ex parte Hubbard* (6); *Meyerstein* v. *Barber* (7); *Ex parte Close* (8); *Grigg* v. *National Guardian Assurance Co.* (9); *In re Cunningham & Co., Ltd.* (10). The argument of appellants' counsel confuses a "warrant," which is a document affording evidence of title to goods, with a "delivery order," which is a document entitling a person to a delivery of goods: see sections 87 and 88 of the Stamp Act, 1870, and sections 69 and 111 of the Stamp Act, 1891, where the distinction between these documents is clearly drawn.

If we are right in our contention that the validity of these pledges in no way depended upon the invoices and warrants, which only came into existence after the pledges had been created, and were evidence of title only, then registration under the Bills of Sale Act of 1879 was unnecessary. *Charlesworth* v. *Mills* (11). In any case these documents are excluded from the necessity of registration by the exempting words in section 4 of the Bills of Sale (Ir.) Act, 1879. They were used in the ordinary course of business of the company, and the creation of pledges of whiskey was clearly contemplated, and provided for, when the second debentures were issued.

(1) [1896] 1 I. R. 501.
(2) [1897] 1 I. R. 488.
(3) [1906] 1 I. R. 446.
(4) 5 Bing. N. C. 136.
(5) 6 H. & N. 828.
(6) 17 Q. B. D. 690.
(7) L. R. 2 C. P. 38.
(8) 14 Q. B. D. 386.
(9) [1891] 3 Ch. 206.
(10) 28 Ch. D. 682.
(11) [1892] A. C. 231.

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THE LORD CHANCELLOR:—

The question now to be considered in this case has reference only to that part of the judgment of Mr. Justice Barton declaring that the plaintiff was entitled to a good and valid pledge on the whiskeys contained in the warrants set forth in the second schedule attached to the judgment, and that the pledge had priority over the second debentures issued by the defendant company. It is plain, and has been practically admitted, in view of clause 4 of the conditions referred to in the second debentures, that if a valid pledge in favour of the plaintiff be established, the priority decreed could not be questioned. The existence of such a pledge is the fundamental issue in the case. A good deal was said, in the hearing in this Court, about the application of the Bills of Sale Acts to the documents relied on by the plaintiff; but it is remarkable that not a word was said upon the subject in the statement of defence. Before Mr. Justice Barton, the same prominence was manifestly not given to that branch of the case, and while the statement of defence did plead the want of registration under section 14 of the Companies Act, 1900, I see nothing in the learned Judge's notes on the evidence, or in his judgment, indicating that his attention was called to the contention. These, however, are secondary considerations. I shall deal with them later on, and I proceed, in the first place, to discuss the vital question involved, namely whether the Court is satisfied that the plaintiff has established a good and valid pledge. It is unnecessary to quote the well-known definitions of a pledge given by the text-writers, but a certain feature of a pledge is, that while delivery is an essential part of it, the delivery need not necessarily be actual or manual, but may be constructive or symbolical. In *Meyerstein* v. *Barber* (1), Mr. Justice Willes states the position with great precision, and, so far as I know, there never has been any qualification of what he said. His words are: "But in order to complete the pledge it is not necessary that there should be an actual delivery of the chattel to the pledgee: it is sufficient, as was decided in *Reeves* v. *Capper* (2) and the

(1) L. R. 2 C. P. 38, at p. 52. (2) 5 Bing. N. C. 136.

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other cases to which reference was made in the course of the argument, if there be a constructive delivery. It is not necessary that the subject of the pledge should have actually passed from the hands of the pledgor to those of the pledgee. The property in the goods may pass, even though they remain in the possession of the pledgor, provided they do so by virtue of a contract between the parties which makes the custody of the pledgor the custody of the pledgee." After further reference to the facts in *Reeves* v. *Capper* (1), he adds: "So in many cases, a symbolical delivery is held to be sufficient; a symbolical delivery being equivalent to such a constructive delivery as will complete a pledge." Here we are dealing with a pledge said to have been made by a distillery company in favour of the plaintiff, one of the directors, of whiskey manufactured by them and deposited in a distiller's warehouse on the company's premises, within the definition of section 3 of the Spirits Act, 1880. It is the common case that the warehouse was approved of by the Commissioners of Inland Revenue under sect. 49 (*a*) of the Act. An officer of the Commissioners was in charge of the warehouse, and, no doubt, the whiskey, placed there by the company, waited there in bond, and could not actually be delivered, except upon the payment of the prescribed duties and charges. Notwithstanding this provision, the possession and property in the whiskey, while so detained in the warehouse, in ordinary circumstances, remains beyond doubt with the distillery company. The warehouse in this case was the premises of the company, and the company was the warehouse-keeper. Actual delivery then was dependent upon the payment of the duties chargeable. The defendant company, for its own purposes, were entitled to make a valid pledge of the spirits so lying in the warehouse, and as to the holders of the second debentures, they had express notice that pledges could be made by the company, to take priority of those debentures, by warrants and other means. The facts of the present case appear in the notes of evidence furnished by Mr. Justice Barton, and, on examination of them, I agree with the learned Judge that there was a distinct contract between

(1) 5 Bing. N. C. 136.

the company and the plaintiff, to the effect that in consideration of the advances made by him to the company, exceeding £2000, the company would give him a pledge of certain specified whiskies lying in their warehouse. The pledge was renewed from time to time with regard to different casks of whiskey, and I agree with Mr. Justice Barton that in pursuance of that agreement the whiskey now in question was specifically marked in the books of the company with the name of the plaintiff. That was certainly done to evidence the fact that the pledge had been effected, and manifestly to show that the possession of the property was vested in the pledgee. The transaction could have no other purpose or effect. The company plainly agreed with the plaintiff to hold the whiskey so dealt with in their custody for and on behalf of the plaintiff. Actual delivery was obviously difficult to be made, and, as a matter of course, it would be subject to the payment of the duties to the commissioners. Beyond question the company intended to make a valid pledge. The plaintiff made his advance, on the faith that he would receive a valid pledge, and the question is whether or not the Court is prevented from viewing the transaction in the light in which the parties themselves contracted that it should be regarded. The company was plainly acting under the powers reserved to it under the conditions of the second debentures; and, no doubt, under advice, fortified by their own experience in their business, that valid pledges could be made by the company by the course taken by it. In *Cox* v. *Dublin City Distillery Company* (1), like pledges had taken place, and it was not, in that case, questioned that they were perfectly effective, and the learned Judges in this Court proceeded through the case, on the assumption that they were. But the matter was not left at the stage I have mentioned. Invoices and warrants were delivered, by the company to the plaintiff, of the particular whiskey, the subject of each pledge. It has been said that these invoices represented a sale. I do not accept that contention. They were merely declarations by the company that as bailees of the property, then lodged in the warehouse, they were holding it for the plaintiff. As well, warrants

(1) [1906] 1 I. R. 446.

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were given to the plaintiff, also specifying the property in question, stating that it was being held in "free storage," but that it was deliverable to the plaintiff on payment of the other charges affecting it. This was not an order for delivery given by an owner of property in a warehouse kept by a third person, in which it might well be said that an attornment to the pledgee by the warehouseman to hold the goods for him would be necessary to complete the pledge, by the constructive possession that would undoubtedly be thereby effected. We are dealing with a case where the pledgor himself held the goods in his own warehouse in pursuance of a contract between the plaintiff and the company, and their entries in their own books were but an evidence and record of the pledge and of the constructive possession granted to the plaintiff. But the whole transaction was placed beyond all doubt by the declarations involved in the invoices and in the warrants, which plainly meant that the plaintiff was entitled to obtain the actual possession on the payment of the proper charges to the Commissioners of the Inland Revenue. Having regard to mercantile experience and the necessities of the case, nothing more, in the ordinary course, could be expected or required to complete a valid and binding pledge. The dealing and agreement between the parties was intended to have that effect, and it would be against the uniform course of the law not to interpret, as far as possible, the acts of the parties in the sense in which they were intended. It is said, however, that the plaintiff was guilty of laches in not obtaining actual delivery, but there was nothing to disparage the action of the plaintiff. The plaintiff knew that possession was being held by the pledgor as bailee for him, and by nothing that happened was his right as pledgee forfeited. All that was said about the plaintiff in not going to the officer of the Commissioners and presenting his warrants, and signing the yellow form so much referred to, and by paying the charges to secure actual delivery, did not, in my opinion, qualify in any respect the right the plaintiff had acquired by the valid and complete pledge made to him. I have, accordingly, arrived at the conclusion that a good and valid pledge was given by the company to the plaintiff of the property in controversy, and thatthe plaintiff is now entitled to the full benefit of it. I have thought it the better course to state, in a

connected form, my own estimate of the case in regard to the question of the existence of the pledges. It will be quite manifest what my views are of the law involved in the various aspects of the subject. It appears from all the authorities that a pledge essentially consists of a contract, and the quotation from Mr. Justice Willes in the *Meyerstein Case* (1) makes the fact plain without quoting any other of the numerous authorities on the point. The sufficiency of constructive and symbolical possession was the subject of discussion long before the *Meyerstein Case* (1) by Lord Kenyon in *Chaplin* v. *Rogers* (2). At p. 194 of the report he said:—"Where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property." That is a decision more than a century old, and it is noticeable how Lord Kenyon already spoke of the other "indicia of property," as well as of the delivery of the key of the warehouse in which the goods were lodged. No doubt the term "property" represented possession, for the subject was, at the time, one of possession. The judgments in the *Meyerstein Case* (1), both in the Common Pleas and in L. R. 4 H. L. 317, in expounding and vindicating the law of constructive or symbolical delivery in the case of pledges, discuss the necessity of the adoption of such principles in many of the great commercial transactions, whether by land or sea. Though he was dealing with a bill of lading in that case, a passage from Lord Hatherley's judgment at p. 329 L. R. 4 H. L., may be quoted for what I consider the general view underlying it:—"The principle seems to be the same," he says, "according to the view which Mr. Baron Martin takes, which is this: There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property." Later on, at p. 330, no doubt still speaking of a bill of lading, he says:—"When they" (that is the goods) "have arrived at the dock, until they are delivered to some person who has the right to hold them, the bill

(1) L. R. 2 C. P. 38. (2) 1 East, 190.

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of lading still remains the only symbol that can be dealt with by way of assignment or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed." Lord Hatherley, in referring to warrants for delivery, and to orders for delivery accepted, places them, in my judgment, on the same level, and he speaks of them both as "equivalent to delivery." From what I have quoted, the general policy of the law becomes apparent, of accepting, in special cases, a constructive and symbolical delivery as equivalent to actual delivery. I cannot but think that such delivery is the natural one to expect in the actual circumstance of the present case. There is no doubt that the attornment to a pledgee by a warehouseman with whom a pledgor's goods are deposited is a good constructive possession. Baron Parke, in *Farina* v. *Home* (1), puts the matter thus:—"The wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee and his possession that of the assignee, and then only is there a constructive delivery to him." In the case of a pledge, the same law applies: *Young* v. *Lambert* (2). An equal result arises from a contract between the pledgor and pledgee, if the pledgor and pledgee agree, as they manifestly did in the present case, that the pledgors, as warehousemen, should hold the pledged goods for the pledgee. *Martin* v. *Reid* (3) is an authority frequently quoted on that subject. Erle, C.J., in his judgment in it, says:—"The question is, whether, as between these parties, the words used constitute the premises of Martin" (the pledgor) "the premises of Bowers" (the pledgee) "for this purpose. I am clearly of opinion that the intention of the parties will be carried out by holding them to be so. It has over and over again been decided that the words of an agreement are to have effect according to the mind and intention of the parties." . . . "And, in many instances, the warehouse of the vendor has been held to be the warehouse of the purchaser in order

(1) 16 M. & W. 119 at p. 123.
(2) L. R. 3 P. C. 142.
(3) 11 C. B. (N. S.) 730.

to carry out the intention of the parties. I, therefore, think there was a sufficient delivery of these articles to the pawnee." It will be remembered that in the passage already quoted from *Meyerstein* v. *Barber* (1) Mr. Justice Willes expressly stated the same view to the effect that it was open to a pledgor as the result of a contract with the pledgee to hold the goods pledged as bailee for the pledgee. It is unnecessary to pursue the authorities on the subject further, but I thought it necessary to refer to them, as I have done, in order to support the views I have expressed in holding that there was a valid and effective pledge made to the plaintiff in this case.

There is clear authority that the Bills of Sales Acts have no application in such circumstances as the present: *Ex parte Hubbard* (2) and *Charlesworth* v. *Mills* (3). The documents in the case cannot be regarded as within the Irish Act, 1883, and the definition clause, section 4, of the Act of 1879 expressly excludes from its operation such documents as the warrant and the invoice. Warrants for the delivery of goods, and other documents used in the ordinary course of business as proof of possession of goods, in which category the invoices used must be included, are excluded from the Act. There is no suggestion that there was any sale of the whiskey in this case, and, in my opinion, it is a wholly unacceptable view to treat the invoices as evidence of a sale. They were issued only as documents, like the warrants, intended to demonstrate the possession of the property as being at the time vested in the plaintiff. They were, in my opinion, wholly independent of the pledge itself, and from no point of view did the obligation of registration under the Bills of Sale Acts apply to them.

Finally, I hold that a pledge is neither a mortgage nor charge within the meaning of section 14 of the Companies Act, 1900. The difference between a pledge and a mortgage or charge is well marked, and will be found substantially dealt with in Beal's Law of Bailments (1900 Edition), on p. 132. *Carter* v. *Wake* (4), a decision of Jessel, M.R., is an express decision on the point. See also *Jones* v. *Smith* (5). The question, however, was not, I think, the subject of serious discussion in this Court.

(1) L. R. 2 C. P. 38.
(2) 17 Q. B. D. 690.
(3) [1892] A. C. 231.
(4) 4 Ch. D. 605.
(5) 2 Ves. J. 372.

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The whole case of the appellants, as presented to us, has, in my opinion, failed. I agree in all substance with the judgment of Mr. Justice Barton, and, accordingly, in my opinion the appeal should be dismissed with costs.

HOLMES, L.J. :—

The appeal in this action has been taken from two portions of the judgment of Barton, J., the first of which being so much thereof as declares that the plaintiff became entitled to a good and valid pledge on the whiskies contained in the warrants set forth in the second schedule to the judgment, and that such pledge took priority over the second debentures, and in so far as accounts consequential on this declaration are directed.

Counsel for the respondent stated in the course of the argument in this Court, that the second portion of the judgment appealed from would only be material if the first portion was reversed—a statement with which I understood the appellants' counsel to agree—and as my consideration of the case has led me to concur in the declaration I have quoted, I have not thought it necessary to offer any opinion on the other question.

The pledge claimed by the plaintiff and found to be good and valid by Barton, J., consisted of over 20,000 gallons of whiskey contained in casks stored in the distillery bonded warehouse of the Dublin City Distillery, Limited, a company that has been wound up, and whose assets, including the whiskey aforesaid, have been sold by the receiver appointed by the Chancery Division.

Much of the purchase-money has been applied to satisfy incumbrancers whose title was prior to the plaintiff's alleged pledge, but there is still enough to pay the amount due thereon, as well as the sums due to other pledgees in the same position. In fact, I understand that this is a test action, the result of which, it is agreed, will govern similar claims.

There is no controversy as to matters of fact; and there is, I think, little difficulty in ascertaining what took place between the plaintiff and the company. It appears that the company in the course of its business, and for the purposes thereof, drew bills of

exchange upon the plaintiff for large sums which the plaintiff, having accepted, was afterwards obliged to pay. For the moneys so paid the alleged pledges were given, and I agree with Barton, J., that this mode of security was suggested by the fourth of the conditions to which the second debentures of the company were subject. It is in these words: "Nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the property for the time being of the company in priority to the charge hereby created, with this exception, that the company may from time to time pledge to the bankers or others by delivery warrants or other means their manufactured whiskey and the barrels and vessels containing the same to secure an advance or advances for the purposes of the company's business." The plaintiff, at the time he drew and paid the bills and obtained the pledges, was a director of the company, but there is not the slightest suggestion that he took any advantage of his position as director, and he is to be treated as a banker or other creditor who had made advances for the purposes of the company's business.

The mode in which the pledges were given for the money due to the plaintiff was by the company entering his name in their books as the transferee of specific casks of manufactured whiskey then lying in their bonded warehouse. These entries identified the casks of whiskey pledged by their numbers; and there was at the same time handed to the plaintiff invoices referring with similar particularity to the casks and their contents. He was also given what is called a delivery warrant, a specimen of which is to be found in the judgment of Barton, J. It purports to be a warrant of a certain number of hogsheads of pot-still or patent still whiskey, with the date on which they were bonded, deliverable to Edward Doherty or assigns by indorsement thereon on payment of rent and all other charges from the date thereof. Then follow the particulars of the whiskey, the name of the company, and the signature of its secretary.

I propose to consider in the first place whether what I have described would amount to a good pledge at common law—in other words, before the Bills of Sale Act and the Companies Act, 1900.

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Holmes, L.J.

A pledge to secure a debt may be defined to be a delivery of goods and chattels to the creditor as a pawn to secure payment of the sum due. Delivery of the goods pledged is an essential element; but the delivery may be either actual or constructive. The pledgee has only a special property in what is pledged, the general property continuing in the pledgor; but the pledgee is entitled to hold the goods until payment of the debt; and, upon failure of payment, to sell them.

Where the article pledged is conveniently portable, there is usually an actual delivery; but it often happens that the goods are of such a kind that they can only be transferred from one place to another with much difficulty and at great expense. Accordingly the law recognizes a constructive or, to adopt a happy adjective used by FitzGibbon L.J., in *Cox* v. *The Dublin City Distillery Co., Limited* (1), a "symbolical" delivery. For example, the delivery of the key of a box containing the articles agreed to be pledged might, if so intended, be a constructive delivery of the articles themselves; but this could not be done where such goods as casks of whiskey are stored in large quantities in an extensive warehouse, and only a few of them are to be the subject of the pledge. I am satisfied that if our law allows warehoused goods to be pledged at all as security for a debt, the pledge may be carried out by constructive delivery in the manner employed by the company and the plaintiff. I find in such cases as *Reeves* v. *Capper* (2), *Martin* v. *Reid* (3), and *Meyerstein* v. *Barber* (4) ample authority that a good pledge can be thus given. If the casks of whiskey had been lying in the stores of a warehouseman other than the owner and pledgor, there could I think be little doubt that what was done in this case would constitute the plaintiff pledgee; and I am unable to see that the fact of the pledgor himself being the warehouseman makes any legal or logical difference. I observe in the notes of evidence that reliance seems to have been placed by counsel for the defendants upon the fact that the whiskey was in a bonded store, and that, therefore, the Excise authorities were its custodians.

(1) [1906] 1 I. R. 446.
(2) 5 Bing. N. C. 136.
(3) 11 C. B. (N. S.) 730.
(4) L. R. 2 C. P. 38.

It could not be removed without their permission, and to this extent they may be called custodians; but they had neither property in it nor possession of it. The company had both the property and possession until the pledge, whereupon the possession with the special property I have already mentioned passed to the pledgee. Mr. Cronin, a supervisor of customs and excise, was a witness; and on being asked if one of the plaintiff's warrants were brought to him, would he deliver the whiskey mentioned in it, answered, "Not on that document alone, but I would transfer it in the books (meaning I presume the excise books) to Edward Doherty, and deliver it on the filling up of a proper delivery docket," by Mr. Doherty. Mr. Hurley, another excise supervisor, who was in charge of the excise department of the company's distillery from 1906 to 1909, was also examined. He said he kept books in the office in which whiskey was, in the first instance, entered in the name of the distillers; and on being asked if there was a form in use, on which being given to him properly filled up and signed, he would alter the name in the book, he replied, "no regular form—any bit of paper would do." When shown one of plaintiffs' warrants, he first said he could not act on it, because the words, "Transfer" or "Please transfer" were not in it; but it afterwards appeared in his evidence that he had never seen a similar document, and he said that it was quite possible that the officer might accept it as a transfer if presented to him. I am satisfied that the warrant was given by the company for the purpose of being so used if necessary; and that the Excise officer would have been justified in acting on it.

For these reasons I hold that there would have been a valid pledge of this whiskey at common law. It is, however, argued on behalf of the appellants that, assuming this were so, the pledge is made void by the Companies Act, 1900, section 14, sub-sect. 1, which enacts that a mortgage or charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale shall, so far as security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless filed with the registrar in the manner required by the Act, within twenty-one days after the date of its creation.

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I presume that the document which it is said ought to be filed under this section is the warrant, but I am disposed to agree with Barton, J., that, apart from and independently of the warrant, there was a complete pledge by the verbal agreement to give it, followed by constructive delivery of the casks of whiskey by the transfer in the books of the company, and by the invoices therefor. The delivery warrants neither created nor evidenced the pledge, and were only evidence of the constructive possession otherwise given. If this be so, there would be no mortgage or charge within this section. It may be said that this seems somewhat metaphysical; but there is another ground free from any subtlety upon which I hold that the section does not apply. I am of opinion that if the warrant had been given by an individual pledgor, it would not have required registration as a bill of sale. Section 4 of the Bills of Sale (Ir.) Act, 1879, corresponding to section 4 of the English Act of the previous year, after defining the expression "bill of sale," provides that it shall not include certain specified documents, amongst which I find "warrants or orders for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such documents to transfer or receive goods thereby represented." I should find it difficult to indicate any documents more typical of the documents described after the words "used in the ordinary course of business" in this sentence than the warrants in this case. We have not been referred to any authority on this point, and I believe none exists—a remarkable circumstance having regard to the fact that the Bills of Sale Acts have been in existence for over thirty years, during which an abundance of documents used in the ordinary course of business as proof of the possession or control of goods have been passing from hand to hand.

There is, however, one case to which I have already referred: *Cox* v. *The Dublin City Distillery Co., Ltd.* (1), which although not a direct authority on the point, must be regarded of much weight in the Court.

(1) [1906] 1 I. R. 446.

The question in *Cox's Case* (1) was, whether pledges of a large quantity of whiskey alleged to have been made by the company to the Hibernian Bank as security for advances, took priority of the first debentures. The conditions indorsed thereon differed in one material point from that indorsed on the second debentures. The fourth condition provided that "nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the property for the time being of the company in priority to the charge hereby created"; but neither in that nor in any other indorsement was there anything corresponding or equivalent to the exception relating to pledging manufactured whiskey contained in condition 4 of the second debentures already quoted. The pledge to the bank of a portion of the whiskey was carried out in a different way from that used in the present case; but much the larger part of it was pledged in precisely the same manner as that pledged to the plaintiff in this case. The question in controversy was, whether the bank's pledges took priority of the first debentures. Mr. Ronan began his argument with the proposition "that the bank got a legal title by way of pledge to the property represented by the warrants, which is good against a purely equitable security such as debentures in the absence of notice." The appeal was before the Court on two or three occasions, and was discussed with much energy on both sides; but the strong bar that represented the debenture-holders never challenged the validity of the pledges. The decision was against the bank, inasmuch as it was clearly proved that it had ample notice of the debentures and their contents, but if there had been no notice the judgment would have been the other way.

In considering the questions at issue in this appeal, I have not been influenced by what occurred in *Cox's Case* (1); but it is satisfactory to know that I have come to a conclusion in accordance with the views taken by Judges of the learning and experience of Walker, C., and FitzGibbon, L.J.

(1) [1906] 1 I. R. 446.

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CHERRY, L.J. :—

On both of the questions which have been argued before us I have arrived at a different conclusion from that of Barton, J., and although I cannot but doubt the soundness of my own views, having regard to his judgment and those which have just been delivered by the Lord Chancellor and Holmes, L.J., I think the parties are entitled to know the reasons why I differ from them in this important case.

The plaintiff in this action asks for a declaration that, for the purpose of securing certain advances made by him to the Dublin City Distillery Company (of which he was a director), the company pledged to him certain specified casks of whiskey manufactured by the company, and that these pledges are good and valid in law, and take priority of the second debentures of the company. The defence of the receiver and liquidator of the company who defends, in the name of the company, under the direction of the Court, is twofold. First, he says that the alleged pledge or charge was absolutely void and of no effect, inasmuch as it did not contain the essentials of a good common law pledge; and, secondly, he says that it was not registered, as it ought to have been, under the provisions of the Companies Act, 1900.

Transactions similar to that with the plaintiff were, I understand, entered into by the company with several other directors of the company, and affected almost the entire stock of whiskey held by the company. If the plaintiff's claim is valid, as it has been held to be by Barton, J., these pledges will absorb all the remaining assets of the company; and the holders of the second debentures, and all unsecured creditors of the company, will be left unpaid. The questions involved are, therefore, of great importance.

A similar question of priority as between the first debentures of the company and these pledges arose in the case of *Cox* v. *Dublin City Distillery Co., Ltd.* (1) in this Court. It was decided in favour of the debenture-holders upon grounds which do not apply in the present case, the Court not actually deciding one way or the other whether the pledges were or were not good in law.

(1) [1906] 1 I. R. 446.

Inasmuch then as this latter question, which it is our duty now to decide, did not directly arise in that action, owing to the view taken by the Court on the question of notice, the former decision does not assist us; and although FitzGibbon, L.J., in his judgment, treated the pledges as good (1), I think that he did so merely provisionally for the purpose of his judgment on the other questions involved, and without any intention of pronouncing any judicial determination to that effect.

The whiskey dealt with in the present case was all contained in numbered casks lying in bonded stores on the company's premises. There were two keys to each of these stores, one held by the Excise authorities and the other by the company's servants. Whiskey could not be removed except on payment of duty and with the assent of the Excise authorities and the company. I mention these facts, as something may possibly turn upon them in considering whether there was or was not a valid delivery of possession to the plaintiff of the particular casks claimed by him; but, in my opinion, they do not affect the question which we have to decide. I agree with the view put forward by the Attorney-General on behalf of the plaintiff, that the control exercised by Government officials over whiskey in bond in stores belonging to the owner of the whiskey is only for the purpose of securing the payment of duty; that the Government officials are merely watchmen, not warehousemen; and that the possession remains that of the owner of the whiskey in exactly the same manner as if it were not in bond.

The course of business pursued between the company and the plaintiff was as follows:—Money was advanced by the company's bankers on bills which the plaintiff accepted. The plaintiff was afterwards obliged to take up the bills, and cash was also advanced to the company by him for other purposes. To secure these debts the company agreed to pledge the whiskey. In the company's stock-book each cask of whiskey was described by its number, and a statement of its contents in gallons. Opposite the entry of the number of the cask intended to be pledged as security for each advance the name of the pledgee was written in pencil. An invoice

(1) See page 458 of the report.

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was then delivered to the pledgee in exactly the same form as if the whiskey had been sold to him, setting out the casks pledged by their number and contents, and at the foot of each invoice the words "waiting in bond" were written. He was also given a "warrant" wherein the casks of whiskey, again specifically described, were declared to be "deliverable to" the pledgee "or assigns by indorsement hereon"; the transaction was then entered in the register of mortgages, and the security was supposed to be complete. Nothing more was done to perfect it.

In actual practice, however, these warrants were not used at all as delivery warrants. The principal clerk of the company, Mr. Atkinson, who had acted as such for the whole period of the company's existence, swore that during all that time he had never seen a warrant like the plaintiff's used for the delivery of whiskey. These warrants were treated throughout as what in my opinion, in substance and in fact, they were, namely, mortgages, and not delivery warrants at all. The company, notwithstanding their delivery, exercised exactly the same control over the whiskey described in them as they previously did. They sold it to purchasers, if they could find them, and when they were paid for it, they delivered it, frequently, according to the evidence of the same witness, without even getting up the warrant which had been issued in respect of it. The more regular practice, however, was to get up the warrant and cancel it, enter the name of the real purchaser of the whiskey in ink in the stock-book, and substitute, as a fresh security to the pledgee, other vessels of whiskey, against which pencil entries were again made in the stock-book, and fresh warrants issued, exactly as at the initiation of the transaction. When the whiskey was being actually removed from the bonded warehouse, a yellow form was used which was recognized by the Excise officers, and the formal stamped warrant was entirely ignored. It never was, and in my opinion was not intended to be, an operative document, except for the purpose of a mortgage. By transactions such as this a kind of hovering lien was attempted to be created in favour of certain privileged creditors over the entire stock of whiskey possessed by the company, and it was sought to deprive the second debenture-

holders and unsecured creditors of the only assets available for payment of their debts.

Barton, J., has held that these transactions amounted to valid pledges of the whiskey at Common Law. He does not rest his decision upon the delivery warrants at all, but on the antecedent transactions. "The delivery warrants did not," he says, "*per se* constitute the pledge, and were not essential to it. The pledge was complete when there was an agreement to pledge followed by transfer of the specific whiskey into plaintiff's name and the furnishing to him of the invoices of the goods pledged to him. That was quite enough to constitute a pledge, and to make the possession of the company constructive possession of the plaintiff."

I cannot agree with this view of the learned Judge, that a pledge can be created by a mere agreement to pledge followed by an entry in a book, and the delivery of an invoice. In order to constitute a valid pledge, there must be either an actual or a constructive delivery of possession of the article pledged to the pledgee. It is true that constructive delivery may be presumed without any actual removal of the goods from the premises of the pledgor, but this, in my opinion, can only be under very exceptional circumstances, and there must be, in any event, a distinct change in the quality of the possession of the pledgor. "The essence of a pledge is," in the words of Lord Esher, M.R., in *Ex parte Hubbard* (1), "that the grantee says to the grantor, I will lend you money if and when you deposit certain goods with me. It is not, I will lend you money on the security of an authority to take possession of certain goods."

Now, in the present case, it appears to me that there was no change whatsoever of possession. The whiskey remained, after, as well as before, the entries in the stock-book, under the control of the company in the bonded store. It was sold by the company in the ordinary course of its business, and delivered to purchasers exactly in the same manner as if no pencil entry had been made, and no invoice or warrant delivered. It was then actually delivered, not to the pledgee, but to the purchaser; the

(1) 17 Q. B. D. at p. 697.

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man whose name was written in ink, not in pencil, in the stock-book. Nor do the documents even purport to describe the whiskey as having been delivered to the pledgee. The invoice refers to it as "waiting in bond." The warrant describes it as "deliverable," not "delivered," to the pledgee. The documents, if they mean anything, convey and convey only an authority to take possession. They cannot possibly be read as referring to a possession already delivered to the pledgees. Such possession was not in fact taken in this case either after or before the entries were made, and the invoice and warrant delivered. There is nothing in this case but the documents. There is no evidence of any acts in any way touching the question of possession, apart from the documents: and the documents, as I have shown, refer to an intended delivery of possession, not to a delivery which had actually taken place. It is well-settled law, in the words of Willes, J., in *Meyerstein* v. *Barber* (1), that "a mere contract to pledge even specific goods, and even although the money is actually advanced upon the faith of the contract, is not sufficient to carry the legal property in the goods." Here there was, at most, a contract to pledge, a warrant to take possession of the goods, but possession was never taken under it, either actually or constructively, and there was consequently, in my opinion, no valid pledge at common law.

The entire transaction in this case constituted, in my opinion, a mortgage rather than a pledge. The difference between a mortgage and a pledge is twofold. In the first place, a mortgage of chattels conveys the whole legal interest in them to the mortgagee; a pledge conveys only a special property, leaving the general property in the pledgor; and, in the second place, a mortgage may be made, and usually is made, without any transfer of possession to the mortgagee, while a pledge, by its very nature, involves the transfer of possession from the pledgor to the pledgee. But for the words of the 4th condition, indorsed on the back of the debentures, I do not think it would have occurred to anyone to describe the transaction here in question as a pledge. All the formalities of a sale were observed. In fact, anyone reading the

(1) L. R. 2 C. P. at p. 51.

documents by themselves would think that there was a sale out and out of the whiskey—a sale sufficient to pass the property in the goods, even before delivery, and, therefore, quite inconsistent with a pledge which, as I have mentioned, involves that the general property remains in the pledgor. The entry of the name in the stock-book, the invoice, and the warrant to take delivery out of the bonded store, are all such proceedings as would be usual and almost necessary in the case of a sale. In fact, everything was done in form to complete the sale, except the one thing necessary to constitute a pledge, viz., delivery of possession of the goods.

The case mainly relied upon by the plaintiff as establishing a constructive delivery of possession in the events which occurred here was *Reeves* v. *Capper* (1), generally known as the chronometer case. There the captain of a ship pledged his chronometer, then in the possession of the makers, to the owners of the ship in consideration of their advancing him £50, and allowing him the use of the instrument during a voyage. After the voyage he placed it at the makers, and there pledged it to the plaintiff, for whom the makers, being ignorant of the pledge to the owners of the ship, agreed to hold it, and the money advanced by the owners not having been paid, it was held that the pledge to them was still binding. The *ratio decidendi* of that case, however, was that the captain was the servant of the owners of the ship, and that, therefore, his use of the chronometer during the voyage was not inconsistent with their possession. "We agree entirely," says Tindal, C.J., in that case, "with the doctrine laid down in *Ryall* v. *Rolle* (2), "that in the case of a simple pawn of a personal chattel, if the creditor parts with the possession he loses his property in the pledge; but we think the delivery of the chronometer to Wilson under the terms of the agreement itself was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper. The terms of the agreement were that 'they would allow him the use of it for the voyage,' words that gave him no interest in the chronometer, but only a licence or permission to use it for a limited time *whilst*

(1) 5 Bing. N. C. 136. (2) 1 Atk. 165.

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he continued as their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper, *just as the possession of plate by a butler is the possession of the master.*" It is clear from this passage that the case of *Reeves* v. *Capper* (1) is no authority for the proposition that a valid pledge can be created without a transfer of possession to the pledgee. No doubt, as it was laid down by the House of Lords in *North-Western Bank* v. *Poynter*, *&c.* (2), a pledgee may re-deliver the goods to the pledgor for a limited purpose, without thereby losing his rights under the contract of pledge, but there must be first a delivery of possession before there can be a re-delivery, and I can see no evidence of any such delivery of possession in the present case.

There remains another difficulty in the plaintiff's way in this case. Even assuming that the transaction amounted to a pledge at common law, it would not for that reason be protected from the necessity of registration under section 14 of the Companies Act, 1900, which was in operation when it was created. That section renders void "as against the liquidator and any creditor of the company" certain mortgages and charges unless they are registered within twenty-one days of their creation. Among the classes of mortgages and charges thus requiring registration are specified any such "created or evidenced by an instrument" which, if created by an individual, would require registration as a bill of sale, thus practically applying the provisions of the Bills of Sale Act to dealings by limited companies. The question then is, was the charge in the present case "created or evidenced by an instrument" which is within the definition of a bill of sale in section 4 of the Bills of Sale (Ireland) Act, 1879? Barton, J., has held that it was not. His view is that, although the delivery warrant was given as proof of the plaintiff's right to actual possession of the whiskey, and was, therefore, evidence of the charge, still it came within the exceptions at the end of the section as a warrant or order for the delivery of goods, "used in the ordinary course of business as proof of the possession or control of goods."

(1) 5 Bing. N. C. 136. (2) [1895] A. C. 56.

But how can the warrant in this case be said to have been used in any such way? It was used, and used only, as proof of the charge. According to the evidence, not a single gallon of whiskey was ever delivered to any person on production of one of these warrants. When whiskey was taken out of bond it was always on the production of what was called in the evidence the yellow form, a quite different document. The ordinary course of business of a distiller is the manufacture and sale of whiskey, not the borrowing of money; and if a document such as this warrant was held not to be a bill of sale, it would open the door to a widespread and general evasion of the Bills of Sale Act. Any trader could mortgage all his stock-in-trade in this way by a delivery warrant without ever registering a bill of sale.

The 4th condition indorsed upon the second debentures was referred to in the arguments as strengthening the plaintiff's claim, but I think it can only refer to a pledge validly created according to law, and registered, if registration be required. I do not think it can protect a pledge which is invalid in law, either by reason of an infirmity in its creation, or because it was not registered under the Companies Act. It certainly cannot do so as against the liquidator and the unsecured creditors whom he represents.

For these reasons, I am of opinion that the decision of Barton, J., ought to be reversed, and judgment entered for the defendants.

Solicitor for the appellants: *R. Dickie.*
Solicitors for the respondent: *Kennedy & Sons.*

R. ST. J. C.

M. R.
1912.

June 22.

FINCH *v.* JONES.

Land purchase—Bonus—Sale by tenant for life—Trust for sale—Costs—Settled Land Acts, 1882, *s.* 63; 1884, *s.* 7.

Even though there are trustees in existence who could carry out the sale, and though the effect will be to alter the destination of the bonus, the Court may, where lands are held under a trust for sale, grant permission under s. 7 (2) of the Settled Land Act, 1884, to exercise the powers of a tenant for life for the purpose of effecting a sale under the Irish Land Acts, to the persons beneficially entitled to the income for the time being, where it considers such a course to be for the benefit of all parties, but it will direct such persons to pay the costs of all parties to the application out of the bonus: *Iever's Settlements*, [1904] 1 I. R. 492, followed.

Application on behalf of Charles Singleton Finch and Anna Maria Finch for leave to exercise the statutory powers of a tenant for life pursuant to section 7 of the Settled Land Act, 1884. The application was grounded on the affidavit of Charles Singleton Finch, which was as follows:—

"1. That I did in the month of April, 1859, intermarry with my present wife, then Anna Maria Boyce, and am joint-tenant for life with my said wife of the lands of [setting out the lands the subject of the application] the subject of the sale in this matter, which said lands were purchased by the trustees of my marriage settlement from the Incumbered Estates Court by indenture of conveyance, dated the 5th day of July, 1864 (*and he referred to said indenture*).

"2. That said lands were purchased under the powers and trusts of the said settlement, which is dated the 6th day of April, 1859 [and he referred to said settlement], and that I and my wife, Anna Maria Finch, are the tenants for life under the trusts of said settlement.

"3. I say that the said lands are held upon the trusts for sale, therein fully mentioned and fully set out in the said copy settlement.

"4. That there has been issue of our marriage the following children and no more, who are all still alive and *sui juris*, viz., two daughters and one son as follows:—Emily Marcella, now wife of Henry Bevan Exshawe, and born the 29th day of January, 1861, William Charles, born the 14th day of March, 1862, and Marcella, born the 26th day of June, 1866.

"5. That I did in the month of May, 1911, contract and agree with the tenants of the said lands for the sale of the fee-simple thereof to them under the provisions of the Land Law (Ireland) Acts, 1903–1909, and agreements for purchase have been lodged with the Irish Land Commission at and upon the following terms, viz.: Twenty years' purchase to first-term tenants, twenty-one and a half-years' purchase to second-term tenants, and also an abatement of 15 per cent. on the half-year's rent due by said tenants on the 25th day of March and 1st May, 1911.

"6. There were no trustees of said settlement for some years past, as the last surviving trustee died on the 14th April, 1909, so that there was no one to sell except the tenant for life; and the new trustees, defendants herein, were appointed by deed of the 4th day of March, 1912, and were never in touch with the tenants on the estate.

"7. I say that the income of my estate before this sale amounted to the annual sum of £127 13*s*. 5*d*. after deducting all just outgoings and superior interests, but the tendency of these rents is to go down and the income runs the risk of being reduced in the future.

"8. That the income after sale, provided the purchase-money can be invested at 4 per cent., will be the sum of £119 14*s*. 4*d*.

"9. It is for the advantage of all parties concerned and interested that the said sale should go through, and the arrangements I have entered into with my tenants should be carried into effect as soon as possible, as the terms agreed on between us are very favourable for their district, and I am confident that no better terms can ever be obtained, and that if said sale were now to be broken off the same price would never again be obtained by myself or my successors in title."

The power of investment and trust for sale affecting the said

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lands, contained in the settlement of the 6th April, 1859, was in the following terms:—

"Provided always, and it is hereby agreed between and by the parties to these presents that it shall be lawful for the said trustees or trustee for the time being, during the life of the said Charles Singleton Finch and the said Anna Maria Boyce, and the survivor of them, with their, his, or her consent in writing, to invest all or any part of the said trust moneys, and for that purpose to convert into money or call in any stocks, funds, shares, or securities for the time being subject to the trust hereinbefore declared, in the purchase of any freehold lands, tenements, and hereditaments for any estate of inheritance, or of any leasehold messuages, lands, tenements, or hereditaments for any term of years whereof not less than 500 years shall be unexpired at the time of such purchase, to be conveyed or assigned to them or him, the said trustees or trustee, and their or his heirs, executors, administrators, and assigns, according to the tenure thereof; upon trust that the said trustees or trustee for the time being, and their and his heirs, executors, administrators, or assigns shall at the request in writing of the said Charles Singleton Finch and Anna Maria Boyce during their joint lives, and after the death of either of them, at the request in writing of the survivor of them, and, after the death of such survivor, at the discretion of the said trustees or trustee for the time being, sell the same lands, messuages, tenements, and hereditaments, either together or in parcels, and either by public auction or private contract and with such stipulations as to title or evidence or commencement of title or otherwise, and in such manner in every respect as the said trustees or trustee for the time being shall think fit, with power to buy in or rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, and for the purposes aforesaid or any of them, to execute and do all such assurances and things as they or he shall think fit, and shall stand and be possessed of and interested in the moneys to arise from any such sale after paying thereout the costs attending the same upon the same trusts, and with and subject to the same powers, provisoes, agreements, and declarations, including the said power of purchasing lands, messuages,

tenements and hereditaments, as the money laid out in the purchase of said lands, messuages, tenements, and hereditaments would then have been subject to if the same had not been so laid out; and shall in the meantime and until all such messuages, lands, tenements, and hereditaments shall be sold, pay or apply the rents and profits thereof, or of the part thereof for the time being unsold, to the person or persons, for the purposes, and subject to the powers of appointment, and in the manner, to whom, and for and in which, the dividends, interest, and annual purchase of the trust premises laid out in the purchase thereof would have been payable or applicable under the trusts hereinbefore declared in case such purchase had not been made, it being hereby agreed and declared that the lands, messuages, tenements, and hereditaments, which shall be purchased under this present power, shall when purchased be considered as money to be subject to the same trusts in all respects as the money laid out in the purchase thereof would for the time being have been subject to, if the same had not been so laid out."

Sealy, for the applicants:—

The lands being held under a trust for sale, the leave of the Court is, by virtue of s. 7 of the Settled Land Act, 1884, necessary to enable the applicant to exercise the powers of a tenant for life under s. 63 of the Settled Land Act, 1882. The proposed sale is at a fair price, and satisfactory for all persons claiming under the settlement.

[THE MASTER OF THE ROLLS. Are not the trustees of the settlement trustees for sale? There does not appear to be any necessity for the application. The destination of the bonus will be altered if the application is granted.]

Yes. But the Court will give the desired leave if satisfied that the sale is at a full value even though the tenant for life thereby captures the bonus: *Iever's Settlement* (1); *Settled Land Act and Tuthill* (2). Moreover, in the present case the agreements were made while there were no trustees of the settlement in

(1) [1904] 1 I. R. 492. (2) [1907] 1 I. R. 305.

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existence, and it would be very difficult, if the existing agreements are not sanctioned, to induce the tenants to enter into similar agreements with the trustees.

Moreover, the applicants could refuse their assent to the sale by the trustees.

T. Bodkin, for the trustees :—

We strongly support the application. No doubt the persons entitled in remainder will lose the bonus, but it would be disastrous to allow the present agreements for purchase to fall through.

THE MASTER OF THE ROLLS (1) :—

I shall grant the application under the circumstances, but the applicants must pay the costs of all parties out of the bonus.

Solicitors for the applicants : *Nolan & Dudley.*
Solicitor for the trustees : *J. R. Cresswell.*

A. E. C.

(1) The Right Hon. C. A. O'Connor.

In re H. C. TWEEDY'S ESTATE.

Wylie, J.
1912.
April 23.
Appeal.
May 13.

Irish Land Purchase Acts—Jurisdiction—Practice—Trustees for the purposes of the Settled Land Acts—Appointment—Restriction to lands sold under Land Purchase Acts.

Held, by Wylie, J., that the statutory jurisdiction of the Land Commission to appoint trustees of a settlement for the purposes of the Settled Land Acts, 1882–1890, is limited to receiving the purchase-money of lands subject to the settlement, which have been or may be sold under the Land Purchase Acts.

Held, by the Court of Appeal, that whether there was jurisdiction in the Land Commission to make an appointment without any such limitation, the practice of the Irish Land Commission to make the order limited to lands sold or to be sold under the Land Purchase Acts was too firmly settled to admit of alteration.

Application on behalf of the vendor, *ex parte*, that an order made by the Judicial Commissioner on the 12th June, 1911, be amended by omitting the words limiting the power of the trustees thereby appointed to receive the purchase-money of lands sold under the Land Purchase Acts. By the above-mentioned order, Colonel R. Owen and William S. Kincaid were appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890, of the settlement created by the will of Alice M. Tweedy, to receive the purchase-money of any of the lands, subject to the trusts of said will, comprised in the estate in the title thereof mentioned, which had been or might thereafter be sold under the Land Purchase Acts.

The only property subject to the trusts of the said will which had not been sold under the Land Purchase Acts was a fee-farm rent of £17 15*s.* 4*d.*, which was now being sold privately.

Overend, in support of the application.

Wylie, J.:—

On the 12th June, 1911, on the application of the vendor, I made an order appointing Colonel Owen and Mr. Kincaid trustees of the settlement created by the will of Alice Maude Tweedy, for

Wylie, J. 1912.

In re TWEEDY'S ESTATE.

the purposes of the Settled Land Acts limited to receive the purchase-money of any of the lands subject to the trusts of said will which had been or thereafter might be sold under the Land Purchase Acts. That was the form of order adopted by me in cases where the entire lands comprised in the settlement had not been sold, and where I was informed that other portions of said lands were likely to be sold under the Land Purchase Acts, and was so adopted in order to save the vendor the expense and trouble of making repeated applications. This form is in strict accordance with the decision of Meredith, J., in *Carysfort's Estate* (1).

An *ex parte* application is now made by the vendor to amend the order of the 12th June, 1911, by omitting the words limiting the appointment to sales under the Land Purchase Acts, and thereby making it an order appointing the said persons trustees of the entire property comprised in the settlement for the purposes of the Settled Land Acts, so as to enable sales of portions of the settled lands not subject to the jurisdiction of this Court to be carried out by private sale.

In support of this application I was referred by counsel to a decision of Ross, J., in *In re the Estate of Waring Johnston* (2). The report of that case is very short and unsatisfactory. No reasons are given for the decision. It was an *ex parte* application, and the previous decision of Meredith, J., in *Carysfort's Estate* (1) was not cited.

Were there no conflict of authority, I would not say more than simply refer to the judgment in *Carysfort's Estate* (1), in which I fully concur. But, in view of this conflict, I would like to give my reasons for such concurrence.

The jurisdiction of the Land Commission is statutory, and the only provisions of the Land Acts dealing with the matter are sections 10 and 13 of the Act of 1885, and section 23 of the Act of 1887. Counsel relied chiefly on section 10 as incorporating section 66 of the Landed Estates Court Act, and thereby, as he contended, conferring on the Land Commission a general power to appoint trustees where it might appear expedient.

(1) 39 I. L. T. R. 57. (2) 40 I. L. T. R. 232.

But it seems to me that the first clause of section 10 shows that the incorporated power is limited in two ways: (1) to the case of the sale of a holding by the Land Commission to a tenant or other person, or by a landlord to a tenant where it is agreed that such sale shall be carried out by a vesting order of the Land Commission; and (2) to the purposes of the Act, *i.e.*, the Act of 1885. That the power conferred by section 10 is limited is also shown by the enactment in section 13, which expressly gives power to appoint trustees in case of sales of settled land to the Land Commission, and by section 23 of the Act of 1887, which extends the power given by section 13 to all cases in which it may be necessary to appoint new trustees for the purposes of any sale under the Land Acts.

These sections were clearly intended to enlarge the powers conferred by section 10, and those enlarged powers are expressly limited to the purposes of sales under the Land Acts.

It seems to me, therefore, that the Land Commission has no jurisdiction to appoint trustees for the purposes of the Settled Land Acts in respect of land, or for the purposes of a sale over which the Land Commission has no jurisdiction.

J. E. W.

May 13.

The vendor appealed (1).

Overend, for the vendor :—

Meredith, J., held in *Carysfort's Estate* (2) that, lest the Land Commission should overstep their jurisdiction, it would be well to limit orders appointing trustees to the purpose of receiving moneys arising under the Land Purchase Act. Wylie, J., has gone further and held in this case that he has no jurisdiction to make any appointment without such limitation. Ross, J., had held that under section 10 of the Land Purchase Act, 1885, incorporating section 66 of the Landed Estates Court Act, he could appoint generally: *Waring Johnston's Estate* (3); but Wylie, J., dissents from this view. It is therefore necessary to look at the sections.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) 39 Ir. L. T. R. 57.

(3) 40 Ir. L. T. R. 232

Appeal. 1912.

In re TWEEDY'S ESTATE.

Section 13 of the Land Purchase Act, 1885, provided that where there were no trustees of the settlement for the purposes of the Settled Land Act, 1882, or it was expedient to appoint new trustees, it should be lawful for the Land Commission to appoint . . . *trustees of the settlement* for the purposes of *that* (the Settled Land) Act. This section extended to one case only, viz., a sale by a limited owner to the Land Commission.

The power conferred on the Land Commission was that given by section 38 (1) of the Settled Land Act, 1882, to the "Court," to appoint . . . "trustees of the settlement." By section 38 (2) the persons so appointed are to become and be trustees of the settlement for the purposes (*i.e.*, all the purposes) of the Act. The form of order adopted by the Courts in England and Ireland appoints A. and B. "trustees of the settlement for the purposes of the Settled Land Acts," generally. *In re Morgan* (1); *Harrop's Trusts* (2); *Wright's Trusts* (3).

Chitty, J., has pointed out that in making such appointment under section 38 of the Settled Land Act, the Court has no power to place restrictions on the appointment of trustees or prevent them exercising the full powers conferred by the statute: *In re Countess of Dudley's Contract* (4).

It is therefore clear that under section 13 of the Act of 1885 the Land Commission could only have appointed trustees of the settlement for the purposes of the Settled Land Acts, and could not restrict the appointment. This section, which deals only with the one case mentioned, was extended by section 23 of the Land Law (Ireland) Act, 1887, "to all cases in which it might be necessary to appoint new trustees for the purposes of any sale under the Land Law (Ireland) Acts." It gives no power to restrict the appointment; the words "for the purposes of any sale" refer only to the necessity which is a condition precedent to jurisdiction. It means that section 13 of the Act of 1885 shall extend to all cases in which it may be necessary for the purposes, or by reason of any sale under, the Land Law (Ireland) Acts to appoint new trustees for the purposes of the Settled Land Acts.

(1) 24 Ch. D. 114.
(2) *Ibid.*, 717.
(3) *Ibid.*, 662.
(4) 35 Ch. D. 338, at 343.

The Land Commission not only have jurisdiction under these sections to appoint trustees of the settlement, for the purposes of the Settled Land Acts, generally, but have no jurisdiction to restrict the appointment.

The Land Commission also have power to appoint generally under the sections referred to in *Waring Johnston's Estate* (1). Orders made by the Land Commission in the past are not void, but the restrictions in them are invalid, and the appointments are valid appointments.

THE LORD CHANCELLOR :—

I cannot understand why the vendor insists upon getting this order from Mr. Justice Wylie, when it could, without any difficulty, be made by a Chancery Judge.

I think this is altogether a belated application. The sales to the amount of £12,000 have been arranged, and are now being automatically completed. In my opinion, the present motion was instituted too late. Any other interest has not been represented here by counsel to argue the question of jurisdiction. But lest there should be any doubt as to a practice which has been uniform since 1885, we do not wish to delay our judgment. We do not express any final opinion as to the question of jurisdiction; but, as a matter of convenience at all events, we think the view taken by Mr. Justice Wylie was the right one.

HOLMES, L.J. :—

I do not say anything about the question of jurisdiction; but what I do say, without any hesitation or reservation, is that the practice which was settled in 1885, and acted on ever since, should not be altered or deviated from as regards the form of the order.

CHERRY, L.J. :—

I concur.

Solicitors for the vendor: *MacMahon & Tweedy.*

W. G.

(1) 40 Ir. L. T. R. 232.

M. R.
1910.
April 26.

FITZSIMONS *v.* BLAYNEY.

(1909. No. 963.)

Practice—Chancery Division—Transfer to County Court—Interference with right of way—Trespass—Injunction—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *s.* 36—*Trial of issues at Assizes—Judicature (Ireland) Act*, 1877, *s.* 42.

The jurisdiction to remit actions at common law is distinct from that relating to the transfer of Chancery suits.

An action was brought to restrain interference with a right of way and trespass, and an injunction claimed. The poor law valuation of the plaintiff's lands was £36, but the piece of ground in dispute was of little or no value. The defendant applied under s. 36 of the County Officers and Courts (Ireland) Act, 1877, for a transfer of the action to the County Court, or in the alternative that the issues should be sent to the Assizes for trial.

Held, that there was no jurisdiction to transfer the action to the equity or to the common law side of the County Court, and that the issues should be sent for trial at the Assizes.

NOTICE OF MOTION.

This was an application on behalf of the defendant that all further proceedings in the action should be stayed, and that the action be transferred to the next Civil-bill Court to be held at Downpatrick, in the county of Down, or in the alternative that all necessary issues in the action be directed to be tried at the Summer Assizes to be held at Downpatrick for the said county, and that the defendant might be declared entitled to his costs of the application. The facts of the case, as appeared from the pleadings and affidavits, were as follows:—

The plaintiff and the defendant were neighbours and occupiers of adjoining farms, held at judicial rents under the same landlord in the townland of Ballintogher, near Downpatrick. The plaintiff's farm consisted of about thirty-six acres, with a poor law valuation of £36. Part of the defendant's farm lay between the north-west portion and the north-east portion of the plaintiff's farm. There was a strip of waste or common which the plaintiff used as a roadway when going from the one part of his farm to the other.

The plaintiff alleged that he had a right of way over this strip of land or roadway, or in the alternative that it formed part of his own holding, and that the defendant in October, 1909, had placed a bank of earth on it and prevented plaintiff from using the said roadway. The writ was issued on October 26th, 1909; an appearance entered on November 6th, 1909, and a statement of claim delivered on February 4th, 1910. The endorsement on the writ was as follows: The plaintiff's claim is for damages for the obstruction by the defendant of a right of way to which the plaintiff is entitled and for an injunction to prevent the defendant interfering with or obstructing the said right of way, and for damages for trespassing upon the plaintiff's lands, and for an injunction to prevent the continuance of the said trespass.

The statement of claim, after setting out the above facts, claimed the following relief, viz.—(1) A declaration that the plaintiff was entitled to a right of way to and from his said house and lands over said roadway or common, a portion of the lands held by the defendant as tenant from year to year in said townland of Ballintogher, by the route set out in the fourth paragraph hereof, from the north-east portion of the plaintiff's lands to the north-west portion thereof and from the north-west portion to the north-east portion thereof, for himself and his servants on foot and with horses, carriages, and cattle at all times of the year. (2) An order restraining the defendant, his servants, and agents from obstructing the free and uninterrupted user by the plaintiff and his servants of the said right of way as claimed, and that the defendant do forthwith remove said bank of earth and other obstructions upon the said way. (3) Costs of suit. And in the alternative:—

(1) An order restraining the defendant, his servants, and agents from further trespassing upon the said roadway or common, and from obstructing the plaintiff and his servants in the free and uninterrupted use thereof, and for an order that the defendant do forthwith remove the said bank of earth and other obstructions upon the said roadway or common.

(2) Costs of suit.

On March 29th, 1910, the above-mentioned notice of motion was served by the defendant. He admitted that the plaintiff was entitled to a right of way over the said ground or roadway,

M. R. 1910. FITZSIMONS v. BLAYNEY.

but not to the right of way claimed; he alleged that the piece of ground in question was a common or waste and of no value, and produced a map and separate valuation of it. He further alleged that the necessary witnesses for the plaintiff and the defendant resided at or near Ballintogher, and that the action was a petty and insignificant one, which could have been instituted in the Civil-bill Court, and that it could be more conveniently and cheaply tried in the said Civil-bill Court or at the Downpatrick Assizes. The plaintiff, in his affidavit in reply, said that the piece of ground in dispute was of little value, but that the right of way which the defendant obstructed was very valuable to him, as without it he was practically cut off from portion of his holding, and unable to get to it except at great inconvenience. He said that he was advised that he could not bring the action in the County Court, as he claimed that the lands in dispute were his, although a right of way over them would be quite as good to him, as the lands themselves were worthless; that there was no separate valuation of the lands in dispute, and that his valuation was £36. He was advised that the County Court Judge had no jurisdiction to try the case even on consent, but he had no objection if the Court thought it right to remit the case to be tried at the next Civil-bill Court for Downpatrick, on June 13th, or at the next county Down Summer Assizes.

James Andrews in support of the motion.

The case is a trifling one, and should be sent to the County Court, if there is jurisdiction to send it. A separate valuation of the piece of land in dispute has been made, and it is of no value. It cannot be sent to the Equity side of the County Court under section 36 of the Act of 1877 (40 & 41 Vict. c. 56), as the cause of action does not come within the provisions of section 33 of that Act, which gave the Civil-bill Court the jurisdiction of the Court of Chancery in certain matters. But it can be sent to the Common Law side of the Civil-bill Court. The writ asked for damages and an injunction. Those could have been asked for in the County Court, and a decree for damages and an injunction could have been granted: Judicature (Ir.) Act, 1877, sects. 28 (8) and 79. The relief claimed by the writ has been amended by

the statement of claim, and put in a different form. In *Gillespie* v. *Willoughby* (1), the King's Bench Division under section 6 of the Common Law Procedure Act, 1870, remitted to the County Court an action for damages for obstruction of a right of way and for an injunction. In *Oliver* v. *Kearney* (2) the Court of Appeal transferred an action for a declaration of title from the Chancery Division, as it was in substance a claim for specific performance or for a declaration of trust. The distinction between the Common Law jurisdiction to remit and the Equity jurisdiction to transfer is referred to there by your Lordship.

If the case cannot be sent to the County Court, the issues should be sent for trial to the assizes.

Williamson, for the plaintiff:—

I wish to have the case sent to the Assizes for trial, but if there is jurisdiction to send it to the County Court, I have no objection. If the claim for an injunction had not been made, the action could have been brought in the County Court. In *M'Thomas* v. *Prentice* (3) an action for disturbance of a right of way was remitted under section 6 of the Common Law Procedure Act, 1870, with a provision that in the event of the plaintiff recovering a sum under £5, he should be entitled to the full costs of the action. If that was done, I would be satisfied. The separate valuation that has been made does not make any difference, as the right of way affects the whole farm: *De La Poer* v. *Boland* (4); *Reilly* v. *Nugent* (5).

THE MASTER OF THE ROLLS (6):—

My view is that an application to *transfer* a suit in this Court to the Civil-bill Court under section 36 of 40 & 41 Vict. c. 56, is in its essentials different from an application on the common law side to *remit* what I may call a common law action to the County Court. In *Oliver* v. *Kearney* (2) referred to by Mr. Andrews, which was an appeal from an order of Barton, J., and came before Holmes, L.J., and myself, I pointed out incidentally that the

(1) 36 I. L. T. R. 114.
(2) 43 I. L. T. R. 282.
(3) 11 I. L. T. R. 75.
(4) 19 I. L. T. R. 39.
(5) Ir. Rep. 9 C. L. 206.

(6) The Right Hon. R. E. Meredith. The publication of this and the following cases decided by His Honor has been unavoidably delayed. [REP.]

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FITZSIMONS v. BLAYNEY.

jurisdiction to remit a Common Law action was not identical with the jurisdiction to transfer a Chancery suit. I go further and say that so far from being identical, the jurisdiction is governed and limited by wholly different considerations. I need not refer to the limitations in point of time, nor to the very stringent conditions under which an appearance has to be entered under the Common Law Procedure Act, 1870, or to the power to give security. In the case of a suit in the Chancery Division section 36 preserves jurisdiction down to the last moment. [The Master of the Rolls read the section.] The Courts have always held that the order of transfer under section 36 is an order of transfer to the equity side of the County Court, and apart from the different limitations as to remitting and transferring to which I have referred, I call attention to the last words of section 36: "And the parties there shall have the same right of appeal which they would have had if the suit or proceeding had been commenced in such Civil-bill Court." I must read the section as a whole, and I must preserve to the parties the same right of appeal. But there is a difference as to the mode of appeal in equity and at Common Law. There is an alternative right of appeal in an equity suit to the Lord Chancellor or to the Judge of Assize. It only strengthens the view that there are two different Courts. Therefore, when Mr. Andrews admitted that this action could not have been brought on the equity side of the County Court, I cannot apply the provisions as to the Com mon Law side, because this was not an application to remit. It may be that the Judges of the Chancery Division have an inherent jurisdiction to stay proceedings which ought to have been brought on the Common Law side of the Court. If ever such a case arises, I desire to leave the matter open.

As regards the alternative application to send the case to the Assizes, I think that it would be more satisfactory that the issues should be tried there where the parties reside, and I shall make an order accordingly for trial of the issues before a Judge at the next Assizes at Downpatrick.

Solicitor for the plaintiff: *Michael J. Johnston.*
Solicitor for the defendant: *William Martin.*

W. L.

DAVIS *v.* DAVIS.

M. R.
1910.
Dec. 13.

(1910. No. 846.)

Practice—Chancery Division—Transfer to County Court—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *s.* 36—*Action for declaration of title.*

An action was brought for a declaration that the plaintiff was entitled under a will to possession of three small houses in the town of W., valued at £13. The defendant had recovered possession of one of the houses from the plaintiff by ejectment in the County Court, and had made him tenant at one penny a week; the other two were in the possession of the defendant. The plaintiff alleged that the ejectment had been obtained by suppression of a will; the defendant denied the existence of the will, and relied on an independent title.

The defendant moved to transfer the action to the County Court, under sect. 36 of the County Courts (Ireland) Act, 1877. At the hearing of the motion counsel for the defendant asked the Court in the alternative to stay the action as frivolous and vexatious.

Held, that there was no jurisdiction to transfer the action, and no ground for staying proceedings as frivolous and vexatious.

MOTION.

This was an action brought by George Davis of 72 Castle Street, Wicklow, against Margaret Davis, of 73 Castle Street, Wicklow, claiming a declaration that he was entitled under the will of the late John Davis, who died in October, 1851, to possession of the premises 71, 72, and 73 Castle Street, Wicklow, which were held by John Davis under a lease of September, 1834, from the Corporation of Wicklow, and that the plaintiff might be put into possession of the premises. The writ was issued on August 27th, 1910. The defendant, by notice of motion dated September 1st, 1910, applied to the Court for an order under section 36 of the County Courts (Ireland) Act, 1877, transferring the action to the County Court Judge of Wicklow. Affidavits were filed by both parties, and the motion, which had been adjourned from time to

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DAVIS v. DAVIS.

time, came on for hearing before the Master of the Rolls on November the 22nd, and was finally disposed of on December 13th.

The plaintiff was the brother of the defendant. The property in dispute consisted of three cottages in the town of Wicklow, the poor law valuation of which was £13; one was occupied by the plaintiff as weekly tenant to the defendant at one penny a week, and the other two were in the possession of the defendant. The weekly tenancy in question was made after the defendant had recovered possession of the premises by an ejectment brought in the County Court of Wicklow in 1905; the plaintiff alleged that the ejectment had been obtained by a suppression of the will of John Davis. This was denied by the defendant, who alleged that she and her predecessors in title had been in possession for the past forty years. She alleged that the plaintiff had no means; and had brought a groundless action to annoy her, and submitted that it was in reality an ejectment on the title, and should be transferred to the County Court.

Swayne, for the defendant, in support of the motion.

Although the Court has no power under section 36 of the Act of 1877 to transfer the action as framed to the County Court, it should be stayed on the ground that it is a frivolous and vexatious proceeding, and an abuse of the process of the Court.

M'Cann, K.C., for the plaintiff.

THE MASTER OF THE ROLLS:—

I rest my judgment, firstly, on the ground that this is a case which does not come within section 36 of the County Courts Act of 1877, and, therefore, it is not a case in which I can transfer the proceedings to the County Court Judge; and, secondly, on the ground that it does not come within the class of cases which could have been brought in the King's Bench Division of the High Court, and are only King's Bench Division actions in disguise. It does not come within the class of cases in which the Court has said:—"You brought the case into a Court of Equity because you did not wish to be remitted at Common Law." And why?

Because if the action had been brought in a Court of Common Law there would have been no authority to remit it. Therefore the plaintiff was guilty of no attempt to snatch a victory, or to prevent the remitting of the action, by bringing it in the Rolls Court instead of in the King's Bench Division. In whatever Division of the High Court this action was brought, there is no power to remit it under any of the existing remitting statutes. Speaking for myself, I say that this is a cruel misfortune; the property in dispute is a very small one, and the County Court Judge is capable of dealing with it. But there is a third point. Mr. Swayne says that this is a miserable case, and that it is an attempt to oust the jurisdiction of the Court. He may have meant that it was an attempt to bring in a Superior Court an action which ought to have been brought in the Inferior Court. The answer to that is that the Legislature has infringed on the Common Law as far as it deemed prudent and wise; and if the Legislature has fallen short of the particular case, the Court cannot extend the express words of the statute. Mr. Swayne's last point is that this action is too absurd to be entertained, and that I should stay all proceedings in it. The Court does that in a case which is frivolous and vexatious, and when the plaintiff has no cause of action, but I think that the principle applies which was affirmed by the Court of Appeal in England in the recent case of *Dyson* v. *The Attorney-General* (1), namely, that the Court will not stay an action where there is a question to be tried. The plaintiff here has a right to have the question he has raised tried. I refuse the application, and make the costs costs in the cause, and extend the time for pleading to the second day of next sittings.

Solicitor for the plaintiff: *E. E. Merrick.*
Solicitor for the defendant: *J. H. M'Carroll & Co.*

W. L.

(1) C. A., Dec. 10, 1910. Since reported [1911] 1 K. B. 410.

M. R.
1911.
Jan. 26.

McDERMOTT *v.* DEMPSEY.

(1910. No. 655.)

Practice—Chancery Division—Transfer to County Court without notice of motion—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *s.* 36—*Action to declare money well charged on land—Motion for judgment in default of defence—Sale in County Court directed.*

An action was brought to have two sums of £105 and £45 declared well charged on lands with a licensed house thereon valued at £6. A motion for judgment in default of defence was instituted. The defendant appeared on the hearing of the motion and asked the Court, without his having served any notice of motion for the purpose, to transfer the action to the County Court.

The Court made the usual decree declaring the lands well charged with the sums mentioned, and ordered that in default of payment by the defendant the action should be transferred to the County Court for the purpose of having the decree enforced by sale in that Court, and declared the plaintiff entitled to his costs. *McDonald* v. *Byrne*, 3 New Ir. Jur. 37, not followed.

MOTION FOR JUDGMENT.

This was a motion for judgment in default of defence. The facts of the case were as follows:—The action was brought by Anne McDermott and her brother Thomas Dempsey, against the defendant Patrick Dempsey, for a declaration that two sums of £105 and £45, balance of the two sums of £125 and £75 respectively payable to the said Anne McDermott and Thomas Dempsey, under and in pursuance of the terms of an indenture of family settlement, dated January 31st, 1905, and made between Michael Dempsey of the first part; Patrick Dempsey of the second part; Anne Dempsey of the third part; Margaret Dempsey of the fourth part; and William Dempsey of the fifth part; together with interest thereon as from October 7th, 1909, at 4 per cent. per annum, might be deemed well charged upon the lands of Manus, containing 7A. 1R. 19P., being registered land within the meaning of the Local Registration of Title (Ireland) Act, 1891, situate in the barony of Small-county, and county of Limerick, together with the licensed house and premises thereon,

which lands and premises were in the possession of the defendant as assignee of the said William Dempsey, to whom the said lands were by virtue of the said indenture of settlement assigned, subject to and charged with payment of the said sums of £125 and £75, to the plaintiffs—and for an order for an account of the amount due on foot of the said sums with interest, and for a sale or a receiver. The writ was issued in July, 1910, and on July 14th an appearance was entered by Mr. J. J. Power, solicitor, on behalf of the defendant, asking for a statement of claim, which was delivered on November 1st, 1910. No defence was put in, and on January 10th, 1911, this motion for judgment was served.

In the meantime the defendant changed his solicitor, and on January 18th, 1911, he made an affidavit which was filed on his behalf by Mr. James A. Doyle, solicitor. The defendant stated in this affidavit that the land in question was a very small property consisting of 7 acres 1 rood and 19 perches, statute measure, and a licensed house thereon, the poor law valuation being about £6, including house and lands, and the annual licence being £5 5*s.*; that it was very oppressive on him that proceedings should be taken in the Superior Courts; that the claims of the plaintiffs were in excess of their just shares, and that there was a debt of over £100 payable to one Edward O'Connell, of Limerick, which he claimed was a first charge on the place; and he therefore asked that the case be remitted to the County Court of Limerick, and that the plaintiffs should be only allowed such costs as if they had originated the proceedings by equity Civil Bill. No notice of motion to transfer the case to the County Court was served.

Hon. Cecil Atkinson, for the plaintiffs:—

No defence having been put in, the plaintiffs are entitled to a decree in the terms of the prayer of the statement of claim. Though the land comprised only seven acres, and is valued at £6, there is a public-house which is valuable. There is no motion to transfer here, and even if there were, the Court will not send down a case to the County Court, when there is no defence: *McDonald* v. *Byrne* (1).

(1) 3 New Ir. Jur. 37.

M. R. 1911.

McDermott v. Dempsey.

M. Comyn, for the defendant.

This case should have been brought in the County Court, in which there were proceedings in 1904. The defendant had not sufficient means to defend an action in the High Court, and consequently did not put in a defence. Although there is no motion to transfer to the County Court, this Court has power under section 36 of the County Courts (Ireland) Act, 1877, without any application to transfer it. If a sale is ordered, it can take place in the County Court more cheaply and expeditiously than in this Court. If the case is retained here, the plaintiff should not get costs.

Hon. Cecil Atkinson, in reply—

The defendant could have moved to transfer the action at any time after the writ was served; instead of that he appeared and called for a statement of claim, so he cannot complain of the plaintiffs having incurred unnecessary costs. If a decree is now given, the plaintiff has no objection to further proceedings being taken in the County Court, but he should get his costs up to and including this motion.

The Master of the Rolls:—

It is plain on the admitted facts that the defendant has no defence whatever. Proceedings were taken in 1904, in the Limerick County Court, and compromised, and the compromise was embodied in a family settlement of January 31st, 1905, and by that settlement the sums of £125 and £75 were not merely covenanted to be paid to the plaintiffs, Anne McDermott and Thomas Dempsey, respectively, but these two sums were charged upon this small farm. The covenantor has transferred his interest in the lands to the defendant by deed of March, 1906, and the defendant has had his title registered under the Local Registration of Title Act as owner in fee-simple subject to the charges in favour of the plaintiffs. He appears to have made some effort towards liquidating portion of the debts, but there still remains the sum of £105 due

to the plaintiff, Anne McDermott, and the sum of £45 to the plaintiff, Thomas Dempsey, and they are entitled to a declaration that these sums are well charged, and to have the property sold, and the proceeds applied in payment of their charges. I deprecate the retention of further proceedings in this Court, because all the plaintiffs had to do was to institute a suit in the County Court, produce the certificate of valuation and the certificate from the Registrar of Titles, and there would have been no answer. If I allow these proceedings to continue in this Court, there will be an inquiry at Chambers before the Chief Clerk as to incumbrances, further consideration of the Chief Clerk's certificate, and a sale directed in Court, subject to conditions of sale to be settled by me, and the costs of and incident to these proceedings. No doubt a sale must take place somewhere; but I agree with Mr. Comyn that it will be conducted at less cost in the County Court. I rather deprecate the way in which the defendant has met the case. He says he is too poor to defend an action in the High Court, but he appears to have instructed a solicitor who entered an appearance in this action and demanded a statement of claim on July 14th, 1910, knowing well that by so doing he put off the possibility of a trial before the Long Vacation, or possibly before the following year. If the defendant was really anxious to have these proceedings speedily and cheaply brought to a conclusion, he should have come in, and asked me to transfer the whole case to the County Court. Further I deprecate the suggestion that there is a debt of over £100 payable to Edward O'Connell of Limerick, which he claims is a first charge on the place. Edward O'Connell is not on the register. It can only be a claim which has no force. Therefore, I agree that the defendant has brought this trouble upon himself, and it does not lie in his mouth to use too severe language in reference to the plaintiffs' proceedings. The justice of the case will be met by my declaring these two sums well charged upon the lands, namely £105 to the plaintiff, Anne McDermott, and £45 to the plaintiff, Thomas Dempsey, together with interest at the rate of 4 per cent. per annum from October 7th, 1909, the defendant to have one month to pay these sums,

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together with the costs of this action, up to and including the costs of this motion. In the event of the defendant failing to pay, I transfer the action to the County Court to proceed under my judgment for a sale of the lands and premises which I declare to be well charged.

Solicitors for the plaintiffs: *Wynne and Wynne.*
Solicitor for the defendant: *James A. Doyle.*

W. L.

M. R. 1910.

May 3.

IN RE A. H. ROBINSON, DECEASED; SPROULE *v.* SPROULE.

(1910. No. 312.)

Will—Construction—Power whether personal or annexed to office—Trustees described as "my said executors."

A testator appointed A, B, C, and D, to be executors and trustees of his will, and bequeathed the residue of his freehold and personal property "in trust to my executors aforesaid," and authorized and empowered "my said executors" to sell any real property which they might think advisable, and divide the residue in such proportions as they or the survivor or survivors of them might think fit among the children of S. who might arrive at the age of twenty-one years.

A and B renounced the executorship and predeceased D; C renounced the executorship, and disclaimed by deed the trusts of the will. D, who alone acted in the trusts of the will, in exercise of his statutory power appointed the plaintiff and E (since deceased) trustees of the will in his place.

Held, that the expression "my said executors" was merely a compendious form of designating "executors and trustees," and that the power of sale could be exercised by the plaintiff, the trustee for the time being.

ORIGINATING SUMMONS.

The facts of the case were as follows:—

A. H. Robinson of Fintona, county Tyrone, by his will, dated October 25th, 1880, appointed George Woodhouse, Finlay Buchanan, James Robinson, and Alexander Harper Robinson Sproule, his nephew, executors and trustees of his will, and, after making sundry devises and bequests, bequeathed all the

residue of his freehold and personal property as follows:—"In trust to my executors as aforesaid to pay all debts, the above-named bequests, legacies, annuities, duties, testamentary and other expenses, and afterwards for the education and putting forward in life the children of my nephew, Alexander Harper Robinson Sproule, and I authorize and empower *my said executors* at their discretion to convert into money any part of my personal estate, and to sell or dispose of any real property which they may think advisable, and to divide the residue in such proportions as they or the survivors or survivor of them may think fit and judicious, among the children of my said nephew, Alexander Harper Robinson Sproule, who may arrive at the age of twenty-one years."

The testator made certain dispositions to take effect in the event of there being only one or no such child, which in the events which happened were not material, and died on November 1st, 1880. Probate of the will was granted on June 28th, 1881, to the said Alexander Harper Robinson Sproule, who alone acted in the trusts thereof. George Woodhouse and Finlay Buchanan renounced the executorship, and were both deceased, and James Robinson renounced the executorship, and disclaimed by deed the trusts of the will.

There were four children of Alexander Harper Robinson Sproule living at the time of the death of the testator, namely, Maude Anne Sproule, Alexander Harper Robinson Sproule, junior; Jennie Sproule, and John Robert Sproule, who attained the age of twenty-one years after the death of the testator. Maude Anne Sproule married Andrew George Rorke, and was deceased intestate and without issue, leaving her husband surviving. There were also four other children born after the death of the testator, namely, George Sproule, Irene Sproule, and James Charles Sproule, all of whom were of age, and Anne Sproule, who was still a minor.

By indenture, dated June 6th, 1906, and made between Alexander Harper Robinson Sproule of the first part, the said Maude A. Rorke of the second part, Alexander Harper Robinson Sproule, junior, of the third part, Jennie Sproule of the fourth part, John Robert Sproule of the fifth part, and George Sproule of the sixth part, the said Alexander Harper Robinson Sproule, in

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exercise of the statutory power in that behalf, appointed the said Maude A. Rorke and Jennie Sproule to be trustees in the place of the said Alexander Harper Robinson Sproule, for the purposes of the will of the said Alexander Harper Robinson, and thereby declared that the real and personal property specified therein, and all other property subject to the trusts of the said will, should vest in the said Maude A. Rorke and Jennie Sproule upon the trusts thereof, and it was thereby also witnessed that the said Alexander Harper Robinson Sproule, junior, John Robert Sproule, and George Sproule thereby consented to the said property being vested in the said trustees, and covenanted that they would not charge the trustees thereby appointed with any past default or breaches of duty in execution of the trusts of the will of the said Alexander Harper Robinson, and the said Maude A. Rorke and Jennie Sproule thereby agreed to withdraw certain Chancery proceedings then pending against the said Alexander Harper Robinson Sproule. By deed-poll, dated August 22nd, 1908, after reciting *inter alia* that doubts had arisen as to whether the power of appointment given by the will was exercisable by the said Alexander Harper Robinson Sproule, or by the then trustees of the said will, the said Alexander Harper Robinson Sproule, and the said Maude A. Rorke and Jennie Sproule, so far as the said power was vested in them respectively, irrevocably appointed that one undivided eighth part or share of the property then subject to the trusts of the said will should belong to and be held in trust for the said Maude A. Rorke absolutely.

By another deed-poll, dated October 12th, 1908, the same parties, after recitals similar to those contained in the last-mentioned deed, irrevocably appointed in like manner that one undivided eighth part or share of the said property should belong to and be held in trust for each of them, Jennie Sproule, John Robert Sproule, and James Charles Sproule respectively. Maude A. Rorke died on January 19th, 1909, and no new trustees of the will had been appointed in her place, and Jennie Sproule was the sole trustee thereof.

It had lately become desirable to sell certain hereditaments forming portion of the said trust estate, and an offer had been obtained for the purchase of the same, but difficulties had arisen

owing to the circumstances aforesaid as to how title could be made. The persons entitled to the undivided share of the property were willing to concur, and if the power of sale was not now exercisable, it was proposed to appoint the undivided shares of the said hereditaments not yet appointed to one or more objects of the power who were *sui juris*. The purchaser was advised that the only objects of the power were the children of Alexander Harper Robinson Sproule, who were born in the lifetime of the testator. Jennie Sproule, the trustee, was advised that any unappointed parts or shares of the trust property would be divisible amongst all the objects of the power equally, irrespectively of the shares already appointed, and she was desirous of making such further appointments as might modify that result.

A summons was accordingly taken out by Jennie Sproule, the trustee, to determine *inter alia* the question whether the power of sale given by the testator to the executors named in his will was still exercisable, and if so by whom. The defendants to the summons were Alexander Harper Robinson Sproule, junior, John Robert Sproule, George Sproule, Irene Sproule, James Charles Sproule, Anne Sproule, and Alexander Harper Robinson Sproule, senior.

John Leech, K.C., for the plaintiff:—

The plaintiff was appointed trustee by Alexander Harper Robinson Sproule under the provisions of section 10 of the Trustee Act of 1893, and it is submitted that she can exercise the power of sale. The testator first appointed four persons executors and trustees of his will, then he bequeathed the residue of his property to "my executors aforesaid," and empowered "my said executors" to sell. If he had added the words "and trustees" after the word "executors," there would have been no question that the trustee for the time being could sell. In *In re Smith, Eastwick* v. *Smith* (1), where the power of sale was given to "my said trustees," it was held that the power of sale was not personal to the trustees originally named, but was annexed to the office, and could be exercised by the trustees or trustee for the time being,

(1) [1904] 1 Ch. 139.

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following the principle of the decision of the Court of Appeal in *Crawford* v. *Forshaw* (1), where it was held that a power of distribution given to "my executors herein-named" was a power annexed to the office of executor, and could be exercised by the executors who had proved the will. It is submitted that in using the words "my executors aforesaid" the testator meant to refer to the persons he had appointed executors and trustees.

Horner, K.C., and *Denning*, for the defendants.

THE MASTER OF THE ROLLS:—

Eastwick v. *Smith* (2) would be a direct authority on this case were it not that the words there, instead of being "in trust to my executors aforesaid," were "unto my said trustees upon trust," but in both cases, *e.g.*, in the will in *Eastwick* v. *Smith* (2), and in the will in the present case, the testator had appointed particular persons as executors and trustees of his will, and I accept and adopt the language of Farwell, J., in that case, and I proceed to apply the principles there laid down by him, following as he did *Crawford* v. *Forshaw* (1), to the present case.

Briefly stated, it comes back to the old principle of a question of construction on the words of the particular will interpreted in the light of judicial decisions applicable to it. Small changes, small differences in the description of the parties entrusted with powers, are not now sufficient to defeat the real intention of a testator, and if you look at the arguments in particular cases, you find curious suggestions as to what transposition of words may do. A considerable number of years have elapsed since the year 1891, when *Crawford* v. *Forshaw* (1) was decided, and since it was suggested, as it was there, that there was a distinction between "to my executors" and "to my executors herein named." It is obvious that every testator regards his executors as a kind of corporation; he appoints certain persons executors and trustees of his will, and he supposes that they will survive him, and carry out his directions, and exercise the powers given to them by him.

(1) [1891] 2 Ch. 261. (2) [1904] 1 Ch. 139.

He seldom pauses to think that they may not survive him, and that he should provide for their successors. Look at the will here. Having appointed four persons executors and trustees of his will, and having dealt with his property in the way he has done, he proceeds to deal with the residue. Of what? His words are: "And I bequeath all the residue of my freehold and personal property in trust." Is not that a complete disposition? You would expect to find that the persons to whom that disposition is made are to be trustees. To whom is the disposition? To "my executors aforesaid." Going back to the commencement of the will I find that they are George Woodhouse, Finlay Buchanan, James Robinson, and Alexander Harper Robinson Sproule, "executors and trustees of this my last will." In my judgment that word "executors" is merely a compendious form of designation of executors and trustees, and every line in the residuary clause points to the fact that these four persons were not merely executors who could only deal with personal estate, but executors and trustees, endowed with full power of disposition and sale, and discretionary powers of division of the residue of testator's real as well as personal estate. The words are: "in trust to my executors aforesaid to pay thereout all my just and lawful debts, the above-named bequests, legacies, annuities, duties, testamentary and other expenses, and afterwards for the education and putting forward in life the children of my nephew, Alexander Harper Robinson Sproule, and I authorize and expower *my said executors* at their discretion to convert into money any part of my personal estate and to sell or dispose of any real property which they may think advisable, and to divide the residue in such proportions as they or the survivors or survivor of them may think fit and judicious among the children of my said nephew, Alexander Harper Robinson Sproule" (himself an executor), "who may arrive at the age of twenty-one years." I have not any doubt that the principle of the decision of Farwell, J., is just as applicable to the present case, where the testator has used the words "to my executors aforesaid," as it was in *Eastwick* v. *Smith* (1), where the words were "unto my said trustees upon

(1) [1904] 1 Ch. 139.

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trust" . . . "and with full power for my said trustees to sell." I answer, therefore, the first question, that the power of sale is still exercisable, and can be exercised by the plaintiff, the present trustee.

Solicitor for the plaintiff: *King Houston.*
Solicitor for the defendants: *W. E. Orr.*

W. I.

M. R. 1911. Nov. 30.

IN RE NOLAN, DECEASED; SHERIDAN *v.* NOLAN.

(1911. No. 853.)

Will—Construction—Gift for "support" of children—Joint tenancy.

A testator gave to his daughter A all the cash he had in bank, to be used by her for her own support and that of his children B and C, and gave to her all his stock-in-trade, and furniture and other effects, to be applied by her for the like purpose. B and C were adults at the date of the will.

Held, that the word "support" was equivalent to "benefit," and that A, B, and C, took the property absolutely and as joint tenants.

SUMMONS.

This was an application on behalf of Teresa Sheridan, one of the legatees named in the will of James Nolan, for the determination of the following question arising on the construction of his will, namely:—On the true construction of the will of the said deceased what estate and interest passed to Mary Nolan, Teresa Nolan (now Teresa Sheridan), and Jeremiah Nolan, in the testator's cash in bank, stock-in-trade, and furniture and other effects and goodwill of the business carried on by him, under the devise and bequest thereof contained in the said will? James Nolan was a bootmaker, and carried on business and lived at 3 Mary's Lane, in the City of Dublin. He died on December 25th, 1905, having made his will on December 24th, 1905. The will, so far as material, was as follows:—"I give, devise, and bequeath to my daughter Mary all the cash I may have in bank to be used by her for her own support and that of my children

Teresa and Jeremiah. I also give, devise, and bequeath to her all the stock-in-trade, furniture, and other effects, to be applied by her for the like purpose, together with the goodwill of the business carried on by me. I give, devise, and bequeath the head- or ground-rents which I am entitled to out of the houses situate at 24, 25, and 26 Capel Street, and No. 8 Jervis Lane, and 62, 63, and 64 Mary Street, Dublin, equally between all my children, viz., Mary Nolan, Anna Rock, James Nolan, Christopher Nolan, Joseph Nolan, Teresa Nolan, and Jeremiah Nolan, the said ground- or head-rents to be collected by my executors hereinafter named, and paid over to my said children in equal proportions every half year. I direct that the said head- or ground-rents shall not be sold during the lifetime of any of my said children. I appoint my daughter Mary Nolan and my son Christopher Nolan executrix and executor and trustees of this my last will." The will was proved on January 30th, 1906, by Christopher Nolan and Mary Nolan, the executor and executrix named. The net personal estate was sworn at £5138 12*s.* 8*d.* and the real estate at £1760. Mary Nolan died on July 23rd, 1911, having made her will dated July 16th, 1911, and whereof she appointed her brother Christopher Nolan and her sister Anna Rock executors and trustees. Her will had not been proved, but had been propounded by the executors and contested by two of her brothers. By her will she disposed of her share of her father's property in favour of her brothers and sisters Christopher, Joseph, Jeremiah, Anna Rock, and Teresa Sheridan, in equal shares as joint tenants. Teresa Nolan married Patrick Sheridan on June 1st, 1908. All the legatees named in the will of James Nolan survived him. At the date of his death there resided in his house together Mary Nolan, then aged forty-five years, the eldest of the family, who had the entire control and management of the household affairs since her mother's death some years before, Teresa, aged twenty-five years, and Jeremiah, aged twenty-four years. They continued to reside together until Teresa married Patrick Sheridan in 1908, and Mary and Jeremiah resided together till her death in July, 1911. Mary Nolan supported Jeremiah till the date of her death and Teresa till her marriage.

Teresa Sheridan was advised that Mary Nolan had no power

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to dispose of her share of her father's property, and this summons was accordingly taken out on her behalf.

Christopher Nolan and Anna Rock were named defendants.

Timothy Sullivan, for the plaintiff, Teresa Sheridan :—

Mary Nolan had no power to dispose of her share of her father's property ; she was a trustee of it for herself and her sister Teresa and her brother Jeremiah, and the three were joint tenants. Even if it were held that Mary Nolan took a life interest in the property, with a remainder to Teresa and Jeremiah, that would not now affect Teresa's claim to be declared joint tenant with Jeremiah. In a case like the present the weight of authority is in favour of a joint tenancy. Jarman on Wills, 6th ed., vol. ii, pp. 1786–7, and *Newill* v. *Newill* (1) and other cases there cited. An exception to the rule that a gift to two or more simply creates a joint tenancy is sometimes made in the case of a gift to a wife for herself and children, as, for example, in *In re Byrne's Estate* (2), where there was a gift to a wife of property to be held by her for her own benefit and that of her children, followed by a power to the wife to fix the children's portions, it was held that the wife and children did not take as joint tenants ; so in *Bradshaw* v. *Bradshaw* (3), where the wife had a power of appointment, and in *Armstrong* v. *Armstrong* (4), where there was a joint tenancy amongst children after a life interest in the wife. There are two later cases of gifts to children, but decided on different words : *Welland* v. *Townsend* (5); and *K'Eogh* v. *K'Eogh* (6). [The Master of the Rolls referred to *O'Connor* v. *Butler* (7).]

S. L. Brown, K.C., for the defendants, Christopher Nolan and Anna Rock, executors of Mary Nolan :—

Having regard to the words "to be applied," it would be difficult to argue that Mary Nolan took the property absolutely, but they did not take as joint tenants. The words here are not "for

(1) L. R. 7 Ch. App. 283.
(2) 29 L. R. Ir. 250.
(3) [1908] 1 I. R. 288.
(4) L. R. 7 Eq. 518.
(5) [1910] 1 I. R. 177.
(6) [1911] 1 I. R. 396.
(7) [1907] 1 I. R. 507.

the use and benefit": they are "for the support," *i.e.*, for the maintenance, which indicates at most an enjoyment for life; the income was to be used for their support, and the capital could have been resorted to if necessary; when one was left, the only trust was for the support of the survivor. There is no residuary clause in the will, so the personal estate goes after the death of the survivor, as in the case of intestacy, amongst all the children. I must admit that there is a trust, and that it lasts during the lives of Teresa and Jeremiah as long as they required support. *Booth* v. *Booth* (1) shows that a trust for maintenance is not limited to children under twenty-one or unmarried. *Williams* v. *Papworth* (2) may be referred to, but that was the case of a deed where an annuity was to be applied by trustees during the lives of the children and of the longest survivor for their maintenance and education, and it was held that they took a joint interest. There is no difference between support and maintenance; a trust to maintain A does not give the property to A absolutely.

J. H. Nunn, for the defendant, Christopher Nolan, executor and trustee of the will of James Nolan:—

Support need not last for the lifetime of Teresa or Jeremiah. Teresa is married and may not require support. The Court should direct an inquiry.

Timothy Sullivan, in reply:—

It is now said that Mary, Teresa, and Jeremiah were entitled to support for life, and that there is an intestacy after the death of the survivor. Mary was the eldest, and Teresa and Jeremiah, the two youngest of the children, were at home with her. The testator meant to dispose of all his property; he gave his ground-rents to all his children. He did not use the word "support," in the strict sense of the word, as equivalent to "maintenance." In *Lewes* v. *Lewes* (3), cited with approval by Lord Macnaghten in *Williams* v. *Papworth* (4), Page-Wood, V.-C., held that the words "for the maintenance, clothing, and education" were equivalent to "for the benefit" of the children; *a fortiori* as to the word "support."

(1) [1894] 2 Ch. 282.
(2) [1900] A. C. 563.
(3) 16 Sim. 266.
(4) [1900] A. C. 569

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THE MASTER OF THE ROLLS:—

Authorities are of very little use in a case like the present. It is impossible to interpret one man's testamentary intentions by the construction placed upon, or in the light of the intention attributed by a Court to, another man's words, unless the language of each of the documents is identical, or so nearly identical as to make the decision of the Court in the earlier cases binding. The testator, James Nolan, was possessed of considerable property and a large family. His wife predeceased him. He had seven children. Mary, the eldest, I would gather, was to a certain extent regarded as the head of the house; the other children were Anne, James, Christopher, Joseph, Teresa, and Jeremiah. Teresa and Jeremiah were the two youngest. As the will was made on Christmas Eve, 1905, and the testator died on Christmas Day, 1905, and as Teresa Nolan is now aged thirty, it is manifest that she was not an infant in the eye of the law at the date of her father's death, nor is it suggested that Jeremiah was an infant at that date. That being the state of his family, James Nolan made his will as follows. [The Master of the Rolls read the will.]

I am asked to put a construction on the will which must eventuate in an intestacy so far as regards the stock-in-trade and goodwill of the testator's business, to say nothing of the cash in bank at the date of his death. I am asked to hold that, having regard to the word "support," the admitted trust in favour of Mary, Teresa, and Jeremiah must come to an end on the death of the survivor of the three; that is Mr. Brown's argument. Mr. Nunn, who appeared for Christopher Nolan, the executor and trustee of the will of the testator, went further, and asked me to hold that the benefit of the trust could not be extended so far as suggested by Mr. Brown, and that, inasmuch as Teresa Nolan was married, an inquiry should be directed to ascertain whether she was in need of support, with a view of excluding her from any benefit. I decide that the testator intended to dispose of all that he had in the world; it is admitted that he had no other property than that mentioned in the will. This case is distinguishable

from *Booth* v. *Booth* (1) and *Williams* v. *Papworth* (2), inasmuch as here the *corpus* is impressed with a trust, whereas in *Booth* v. *Booth* (1) it was only income which was impressed with a trust, and in *Williams* v. *Papworth* (2) an annuity was to be applied for maintenance and education, and it was not the case, as here, of property to be applied, *i.e.* appropriated for particular individuals. There is a clear distinction between a gift such as that in *Booth* v. *Booth* (1) and the gift in the present case. There the testator gave the residue of his estate to his executors upon trust for conversion and investment of the proceeds, and to pay to his wife or permit her to receive the annual income thereof during her life for her own use and benefit, and for the maintenance and education of his children, and from and after her death upon trust to divide his residuary estate equally amongst all his children living at his death. The Judge there was dealing only with the annual income of property during the life of an individual, namely, the widow of the testator. I cannot think that *Booth* v. *Booth* (1) is an authority for the proposition that a gift of *corpus* for the support of children is limited in duration and effect to the lifetime of the children. *Williams* v. *Papworth* (2) is entirely distinguishable. That was the case of a settlement by which land was conveyed to trustees upon trust during the life of Mrs. S. T. Smith to raise an annuity or yearly rentcharge of £416, to be paid to her for her separate use, and after her death the trustees, during the lives of her children and the life of the longest survivor, were to receive out of the rents and profits of the said lands an annuity or yearly rentcharge of £416, the said annuity or yearly rentcharge to be applied by the said trustees for the maintenance and education of her children or child as aforesaid. Lord Macnaghten, in giving the judgment of the Judicial Committee of the Privy Council, there says, at p. 566:—"It was argued by counsel for the appellant that the limitation in favour of the children, one of whom was born after the date of the deed, was void for remoteness. They said that, according to the true construction of the settlement, the trustees had a discretionary power of appointing the annuity among the children according to their several necessities, and

(1) [1894] 2 Ch. 282. (2) [1900] A. C. 567.

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that, consequently, until the class had been reduced to one individual the children had only an uncertain and unascertained interest. They relied upon the use of the word 'applied,' and upon the direction that the annuity was for 'maintenance and education.' But the word 'applied' does not import a word of selection; it simply means 'devoted to' or 'employed for the special purpose of.' Nor is a provision for the maintenance of adults anything more than a provision for their benefit. In the opinion of their Lordships, the meaning of the words of the settlement is perfectly clear. The children take a joint interest in the annuity, but the shares of minors are to be applied for their maintenance and education." Lord Macnaghten then refers to *Lewes* v. *Lewes* (1). *Soames* v. *Martin* (2) and *Wilkins* v. *Jodrell* (3) were cases on wills where similar words have received a judicial construction. There is no case in the books in which a gift to a trustee of *corpus* for the support of A,. B, and C has been held to be a gift in trust for A, B, and C, for their lives and the lives and life of the survivor and survivors, and, in my opinion, the words "to be applied by her for the like purpose" are to be read as meaning to be appropriated for the maintenance or benefit of herself and Teresa and Jeremiah, and, just as the Vice-Chancellor said in *Lewes* v. *Lewes* (1):—"There is no sensible way of dealing with this case except by taking the words 'for the maintenance, clothing, and education' to be equivalent to 'for the benefit of the children,'" so I say that, having regard to the age of the children, there is no sensible way of dealing with this case except by taking the words used by the testator as equivalent to "for the benefit of herself and his children, Teresa and Jeremiah." I think that *O'Connor* v. *Butler* (4) is a distinct authority for reading the words "to be applied" as I have done, for Walker, L.C., says there at p. 511:—"Apart from authority (and none of the cases cited have given us much assistance) the words 'to be applied' must be taken to mean not that the husband should be at liberty to put the money into his own pocket, but that he should apply it in the way specified, and not in any other

(1) 16 Sim. 266.
(2) 10 Sim. 287.
(3) 13 Ch. D. 564.
(4) [1907] 1 I. R. 507.

way; 'to apply to' means 'to appropriate to,' and I think the words imply an obligation on their very face.'" I am, therefore, of opinion that "to apply for their support" is equivalent to "to appropriate for their benefit." The whole trend of authority from *Newill* v. *Newill* (1) down to the present is that if property is left to be applied to a trustee for himself and others, the trustee takes the property for himself and the others as joint tenants, and not otherwise. Once I come to the conclusion that the property was to be applied by Mary Nolan for the benefit of herself and Teresa and Jeremiah, it follows that they were joint tenants, and I decide accordingly.

Solicitor for the plaintiff: *James Brady.*
Solicitor for the defendants: *R. Gordon Hunt.*

W. L.

(1) L. R. 7 Ch. App. 283.

Wylie, J.
1912.
July 9, 11.

IN THE MATTER OF THE ESTATE OF LETITIA LESLIE FOSTER.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48 (1)—*Estate insolvent as to income—Vendor entitled to annuity charged thereon—Bonus—How applicable.*

Where an estate sold under the Land Purchase Acts was insolvent as to income, but the vendor was entitled to an annuity charged thereon, which, at the time of sale, was being regularly paid in its proper priority:—

Held, that the estate was not so incumbered that the vendor was not entitled to receive for her own use any part of the rents or profits thereof, within the meaning of the proviso to s. 48 (1) of the Irish Land Act, 1903, and that the bonus should be paid to the vendor.

QUESTION arising on allocation, as to whether the bonus should be added to the purchase-money or paid to the vendor.

The facts on which the question arose, as stated in the judgment of Wylie, J., were as follows:—

By deed dated the 5th September, 1860, an annuity of £100 was granted to Letitia Leslie Foster, charged upon the lands sold herein and other lands, with power of distress, and, in case of non-payment of any gale for thirty days, to enter into and receive the rents and profits for her own use until the annuity should be satisfied. Subsequently a number of charges were created at different times for considerable sums. Two of these were vested in trustees for the said Letitia Leslie Foster, who afterwards, in 1875, purchased the estate subject to said annuity and charges. She thereupon by her agent entered into receipt of the rents and profits, and thereout was paid the annuity of £100 until about 1904, when she sold part of the lands to her tenants, in the matter of the Estate E.C. 517. In that matter the annuity of £100 was apportioned, £30 being placed on the lands sold therein. That sum was redeemed, and the redemption price and all arrears due in respect of the annuity were paid to her in that matter. A bonus of £414 had been declared

therein, and had been retained in Court pending the decision of this question. The unredeemed balance of the annuity was paid to the said Letitia Leslie Foster, till her death in 1908, but in the meantime she had sold other portions of the lands in the matter of the Estate E.C. 4782, in which a further bonus of £1,252 8*s.* 9*d.* had been declared payable, and had also been retained in Court. The question now raised applied to both these bonuses. It was admitted that the annual income of the lands was not sufficient to pay the annuity of £100 and the interest on the charges, and therefore the estate was insolvent as to income.

W. M. Jellett, K.C., for the executors of the vendor:—

There is nothing in the first clause of the proviso to s. 48 (1) of the Act of 1903 to prescribe the capacity in which the vendor shall have received any part of the rents or profits. In the present case the vendor, at the time of sale, was in receipt of the rents and profits for her own use to the extent of her annuity, and the bonus should be paid to her representatives. The decision of the Court of Appeal in *In re Holmes' Estate* (1), applies by analogy. In any case an annuity is not an incumbrance, although arrears of an annuity may be.

M. G. Longfield, for certain puisne incumbrancers:—

The case comes within the first clause of the proviso to s. 48 (1). The vendor received no part of the rents or profits in her capacity as owner of the lands. Under the deed of 1860 she was not entitled to go into receipt of the rents and profits unless the annuity was in arrear for thirty days. Plenary solvency as to income is the test to be applied. The estate was admittedly insolvent as to income, and the bonus should be added to the purchase-money. If it is otherwise decided, an intending vendor of an insolvent estate, by buying up a small charge, prior to the sale, will be enabled to capture the bonus.

Herbert Wilson, K.C., for another puisne incumbrancer:—

In re Holmes' Estate (1), has no application to the first clause of the proviso to s. 48 (1). It was a decision on s. 48 (4), in relation

(1) [1907] 1 I. R. 139.

Wylie, J. 1912.

In re Foster's Estate.

to a question arising on the practice in the Land Judge's Court. The dominating words of the clause in question are "so incumbered that." An annuity clearly comes within the scope of the term "incumbered." The real question is—Was it by reason of the incumbrances on the estate, including the annuity belonging to the vendor, that the vendor was not entitled to receive for her own use any part of the rents or profits thereof?

July 11.

Wylie, J. :—

The question in this case is, whether the bonus is to be added to the purchase-money, or paid to the vendor. This depends on whether, in the words of the proviso to s. 48 (1) of the Act of 1903, "the estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof." In its application to ordinary cases, this has been aptly paraphrased as meaning whether "the estate is insolvent as to income," *i.e.* whether the annual outgoings exceed the annual income. That is the principle which has been so far always applied to decide this question, and it is, I think, obviously correct and sufficient for the purpose in all cases in which the vendor has no beneficial interest in the estate except in the surplus rents and profits after paying all proper outgoings; and, except in such a state of facts, I know of no case, so far, in which the question has been raised.

The facts of this case raise the question in a new form. So far as material they are few and undisputed. [His Lordship stated the facts of the case, as above set out, and continued.] It is obvious, I think, that the usual formula cannot be applied to solve the question now raised. The bonus is payable to the vendor under section 48 of the Act of 1903 and section 2 of the Act of 1904, unless the proviso to section 48 (1) clearly applies to it. There is nothing in that proviso as to "insolvency as to income," and we must go back again to the actual words of the proviso, and ascertain their meaning when applied to the facts of this case. The words are :—"Where the estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents and profits thereof." Now, at the date of sale, and

for thirty years previously, the vendor both received and was entitled to receive the rents and profits, and, therefore, the question is reduced to this, was she entitled to receive any part thereof *for her own use*? It is admitted she was entitled to receive them for her own use to the extent of the annuity. There was always an ample income to pay the annuity in its proper priority. Therefore, it seems to me that, construing the words of the proviso according to their ordinary *prima facie* meaning, this estate was not so incumbered that the vendor was not entitled to receive for her own use any part of the rents and profits thereof.

But it is contended on behalf of puisne incumbrancers, who will not be paid in full out of the purchase-money, that the words mean, receive *for her own use* in her capacity as owner of the lands, and not by virtue of any rent or charge issuing thereout. But why should I interpolate words in order to limit or narrow down the words of the Act? No reasonable argument, as it appeared to me, was advanced by counsel in support of such contention.

On the other hand, counsel for the executors of the vendor referred me to the decision of the Court of Appeal in *In re Holmes' Estate* (1), which, he contended, applied by analogy to this case. That was a decision upon section 48 (4), where the words to be construed were "without the consent of the owner as to price." It was there contended, as here, that "owner" meant owner in his capacity as owner and not as an incumbrancer, and though Holmes, L.J., differed from the other Judges as to the meaning of the words "without consent," they all agreed in rejecting the argument in favour of limiting it to the capacity of the owner as such. That does appear to me to have a strong bearing by analogy upon the argument of counsel for the incumbrancers in this case, and I would apply it if I were not otherwise satisfied that their contention cannot be sustained

It seems to me that the intention of the Legislature as expressed in section 48 of the Act of 1903, and interpreted in sects. 2 and 3 of the Act of 1904, is reasonably clear. The bonus was given to aid or encourage the sale of estates, whether by limited owner,

(1) [1907] 1 I. R. 139.

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owner in fee, or trustees for sale. But it would be of little avail, in case of a limited owner selling, if it were added to the purchase-money. In the same way, a vendor, owner in fee of an estate that is solvent as to income but insolvent as to capital, would not be much encouraged to sell by a bonus to be added to the purchase-money, and, accordingly, in both cases, if the estate, prior to the sale, was solvent as to income, the bonus is to be paid to the vendor. But if, prior to the sale, the estate was so incumbered that the owner, whether a tenant for life, or owner in fee, had no beneficial interest in the estate, whether sold or unsold, the Legislature did not intend to encourage him to sell by giving him a personal bonus as vendor. The bonus in such a case was to be added to the purchase-money for the benefit of the estate. Why the Legislature drew these distinctions in dealing with the bonus I am not at liberty to speculate. I can only gather the intention from the words of the Act.

In this case, as I have said, the vendor was, prior to the sale, entitled to receive the rents and profits, and largely for her own use, and, therefore, in my opinion, the proviso to section 48 (1) does not apply to the case. The bonus must be paid to the executors of vendor.

Solicitor for the executors of the vendor, and certain puisne incumbrancers: *Moore, Keily, & Lloyd.*

Solicitors for another puisne incumbrancer: *William Fry & Son.*

J. E. W.

JOSEPHINE CONCANNON AND CATHERINE ST. GEORGE, LANDLORDS; PATRICK KEANE, TENANT (1).

Appeal.
1911.
June 14, 15, 29.

Land Law (Ireland) Acts—Fair rent—Present tenancy determined prior to the passing of the Irish Land Act, 1909—"Next-of-kin or issue" of tenant—9 Edw. 7, c. 42, s. 65 (1).

M. K., the father of the applicant, held the lands of Shancloon and Immonbeg, containing 289 acres, Government Valuation over £100, under a lease of the 1st March, 1867, for a term of thirty-one years or three lives, from the 1st June, 1863. This lease contained no provisions restricting the user of the lands, which were suitable for the purposes of a mixed farm, and there was evidence that they were in fact so used. M. K., who was then acting as agent for the landlord, on the 17th February, 1887, signed two documents giving a history of the lands of Shancloon and Immonbeg, which went to show that the main object of the lease of 1867 was for the purposes of pasture. In 1889 M. K. was adjudicated a bankrupt, and in 1891 he was evicted for non-payment of rent, and the tenancy was never redeemed. The lands of Shancloon, Government Valuation under £100, were let to M. K.'s wife for seven years, and on the 20th December, 1900, for a term of fifteen years from the 1st November, 1898, for the purposes of pasture. On the 3rd June, 1902, M. K.'s wife assigned the holding to her son, the applicant, who subsequently paid the rent, and was given receipts in his own name. M. K. died intestate in 1903, leaving the applicant, his eldest surviving son heir-at-law. From 1891 to her death in 1903, M. K.'s wife resided on the holding, and from 1905 the applicant resided there, and worked the lands as a mixed farm.

Held, by the Court of Appeal (affirming the decision of FitzGerald, J.), that the applicant came within the provisions of sect. 65 (1) of the Irish Land Act, 1909, as "one of the next-of-kin or issue" of M. K., and that he was entitled to have a fair rent fixed.

THIS was an application by the tenant to have a fair rent fixed on his holding, consisting of 198A., 1R., 3P. of the lands of Shancloon, in the county of Galway. The Sub-Commission dismissed the tenant's application, whereupon the tenant appealed

(1) Before SIR S. WALKER, L.C., and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

CONCANNON AND ANOTHER, *Landlords:* KEANE, *Tenant.*

to the Chief Land Commissioner. The facts of the case are fully stated in the following judgment of Mr. Justice FitzGerald, which was delivered on the 21st day of March, 1911.

FITZGERALD, J. :—

The tenant, Patrick Keane, is a future tenant of the holding before the Court, but claims under section 65 of the Land Act of 1909 (1) to be entitled to fix a fair rent on the same, because his father was a present tenant of a holding of which the present holding formed part, and because his father's tenancy was determined before the passing of the Land Act of 1909. The Sub-Commission dismissed the tenant's application on the ground that the original holding of the tenant's father was let to be used mainly for the purpose of pasture, and because there was no evidence that the tenant resided on the holding, or that it adjoined or was ordinarily used with another holding upon which the tenant resided. The present holding consists of the townland of Shancloon; the area is 198A. 1R. 3P., the rent is £129 18*s.* 6*d.*, and the Government valuation is £90 5*s.* The tenant's father was Mathew Keane. Under a lease of 1st March, 1867, he held not only the townland of Shancloon, but also the adjoining townland of Immonbeg (the area of the two townlands being

(1) Section 65 (1) of the Irish Land Act, 1909, is as follows: —

"Where a present tenancy was determined at any time before the passing of this Act, the Land Commission may, subject to the provisions of the Land Law Acts, on the application in the prescribed manner of any tenant in occupation of the lands comprised in the said present tenancy, or of any portion of those lands, being either—(*a*) The person who was the tenant of the original holding at the time when the present tenancy was determined; or (*b*) If such person is dead, a person who would have been entitled, whether under the will, or as one of the next-of-kin or issue of the said tenant, to the said holding, or any distributive share therein, had the present tenancy therein not been determined, fix the fair rent in respect of the said lands or portion in like manner as if the applicant was a present tenant of the same, and the statutory term resulting from the fixing of such fair rent shall not, nor shall the tenancy, be determined by the expiration of any lease or tenancy existing at the date of such application, but shall continue in like manner as if such lease or tenancy were an existing lease within the meaning of the Act of 1881."

289A. 1R. 15P.) for a term of thirty-one years or three lives, from the 1st June, 1863, at the yearly rent of £189 1*s.* 6*d.* The Government valuation of this original holding was £134. In the lease there are no provisions restricting the user, or indicating the purpose of the letting. The lease was made in pursuance of a promise in writing made by the landlord, and dated the 1st September, 1863; in this document also there is nothing restricting the user, or showing the purpose of the letting. Mathew Keane was not only tenant, but was also land agent of the landlord up to some time in the year 1887. On the 17th February, 1887, Mathew Keane signed two documents prepared for him by the landlord; one purports to give the history of Shancloon, and the other of Immonbeg. They are as follows:—"Shancloon. Before 1860 this farm was held by Mr. G. Lynch; he held it as a grazing farm, with leave to break up from 4 to 6 acres with the landlord's consent, and to meadow sufficient for keep of stock. Mr. St. George did not approve of the way he was farming the land, and he let it to me about 1861 for a grazing farm, with the same power of breaking and meadowing as enjoyed by Mr. George Lynch, excepting that Mr. St. George gave me leave to break up certain parts that had gone out of heart from 6 to 8 acres at a time, with leave to do the same with 6 to 8 acres in another place when the former was laid down in grass. Mr. St. George told me he would give me a lease, and in 1863 he gave me the promise of a lease in writing of this and the adjoining townland of Immonbeg, which lease was to give me the same rights I enjoyed before it was signed by Mr. St. George. Dated 17th February, 1887. I have read over this and it is true.—Mathew Cane. Present, Wm. L. Saulsbury." The next document was as follows:—"Immonbeg. This townland was, before I got it, in the occupation of small tenants, some of whom went to America, and others changed to the townland of Curragh. Mr. St. George then laid it all down as a grazing farm in grass-seed and clover, with leave to break up 4 acres for green crop to feed stock in any part requiring improvement. I had leave to meadow sufficient for stock. Dated 17th February, 1887. I have read this over and it is true.—Mathew Cane. Present, Wm. L. Saulsbury."

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In 1889 Mathew Keane was adjudicated a bankrupt; apparently his assignees must have disclaimed the tenancy, because in 1891 proceedings were taken against him by ejectment for non-payment of rent, and he was evicted. The holding was not redeemed. Shancloon was let to his wife Matilda Keane under an agistment contract for the season of 1891. It was then stated to have been let to her for a term of seven years. This lease was not produced, and I have no evidence as to the provisions it contains. And finally, on the 20th December, 1900, a lease for fifteen years from the 1st November, 1898, was made to her; this lease created the existing tenancy in Shancloon. This lease contains covenants prohibiting the lessee from breaking up more than was absolutely required for the use of the holding, or meadowing more than was required for the cattle, such tillage or meadow not to exceed in any one year 20 acres, and there is also a covenant against alienation or conacring, and a covenant contracting the lessee out of the Land Acts. On the 3rd June, 1902, Mrs. Keane assigned the holding, subject to these covenants, to her son, the present applicant, on the occasion of his marriage, and he has been given receipts in his own name. In 1903 Mathew Keane died, and in 1905 his widow, Matilda Keane, died. Mathew Keane also had a third farm in the townland of Beagh, which adjoined. Mathew Keane lived on Beagh, except from 1868 to 1873, when he lived in a house he had built on Shancloon. 103 acres of Beagh and Immonbeg were sublet by Mathew Keane about twenty-seven years ago to his brother-in-law, James M'Donnell, and on the 2nd August, 1886, a fair rent was fixed by consent on the same at £100 upon the terms that the tenant should not convert into tillage more than 2½ acres of Beagh. From the date of Shancloon being let to her, Mrs. Keane lived on the holding during her life, and since her death her son has resided there; from the date of the eviction in 1891 Mrs. Keane had no other lands except Shancloon. The landlord relies strongly upon the two documents signed by the tenant in February, 1887, as showing the previous history of Shancloon and Immonbeg, and that the purpose of the lease of 1867 was for pasture. He also points out that the valuation of Shancloon and Immonbeg was £134, and that consequently

any question as to the premises included in the lease of 1867 adjoining or being worked with the residential holding of Beagh does not arise. The landlord also raised the question that the tenant was not within the 65th section of the Act of 1900, because he came into possession of the holding, not as one of the next-of-kin or issue of his father, but through and under his mother, to whom the existing letting was made in 1900. I had better deal with this point at once. Assuming that the tenancy formerly existing in Mathew Keane was a present tenancy within the meaning of the 65th section, then the fact that upon such present tenancy being determined it was let to the mother, and by her transferred to her son, does not prevent the son from claiming after his mother's death the benefit of the 65th section. If the mother had survived until after the Land Act of 1909 had been passed, and had not transferred the tenancy to her son, she would have been within the 65th section as a person entitled to a distributive share in the holding. As to the two documents of 1887, they undoubtedly contain an admission on the part of the tenant, Mathew Keane, that Shancloon and Immonbeg were let to him as grazing farms. Mathew Keane was not only tenant, but also land agent of the landlord; but he must have been an ordinary farmer; for five years he lived in Shancloon in a thatched house of which the valuation is £1 10*s*. He became a bankrupt in 1889, and he ceased to be agent in 1887, the same year as he signed these two documents, drawn up for him to sign by the landlord. Under what circumstances he came to sign them I have no evidence, but from his subsequent bankruptcy in 1889, it would not be unreasonable to infer that in 1887 his financial state did not put him in any independent position with his landlord. Notwithstanding that the purpose of the letting may have been to use Shancloon and Immonbeg as a grazing farm, the lease which is the contract in no way limits him to using the holding as such, provided he could use it otherwise consistently with good husbandry. The limitations of breaking up mentioned in these documents have no legal effect where they contradict or are inconsistent with the terms of the lease. Although it may have been the intention of the parties that the holding should be used for pasture, Mathew Keane was perfectly entitled

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to break up as much as he liked, provided he did so consistently with good husbandry. In *Battersby* v. *Nicholson* (1) Lord Justice FitzGibbon said, in reference to questions of pasture, "We must look to three things in order of their importance—(1) the contract; (2) its subject-matter; and (3) any external or collateral evidence of the purpose of the letting." In this case the contract does not prohibit the holding from being used as a mixed farm. The subject-matter of the contract, *i.e.* the holding, is, according to the opinion of the assessor, with which I concur, best suited for being used for mixed farming. As to collateral or extrinsic evidence there is on one side the admission of Mathew Keane, that the holding was let as a grazing farm; so far as this is inconsistent with the contract it has no effect. On the other side there is no doubt that both Shancloon and Immonbeg are and have been for several years used as mixed farms, and there is evidence, necessarily somewhat vague, that they were used as such in Mathew Keane's time. But even assuming that under the present tenancy of Mathew Keane the holding therein comprised was let to him for the purpose of pasture, and as such excluded from the fair-rent provisions of the Land Acts, yet if the existing future tenancy in part of the original holding is not excluded from such fair-rent provisions except by reason of its being a future tenancy, is that not sufficient to enable the future tenant to sustain the application to fix a fair rent? The 65th section does not in terms confine its power to where the present tenancy which was determined was within the fair-rent provisions; it merely says "where a present tenancy was determined," and the 57th section of the Act of 1881 defines what a present tenancy is; it is the 58th section which excludes from the fair-rent provisions certain present tenancies. Also, the 65th section of the Act of 1909 contains a provision that the expression "present tenancy" includes any existing lease within the meaning of the Act of 1881. The expression "existing lease," in the 21st section of the Act of 1881, is used as referring both to leases at the termination of

(1) 22 L. R. I. 38, at p. 43.

which fair rents could be fixed, and to leases at the termination of which fair rents could not be fixed by reason of the duration of their terms. This appears in the words "such of them [*i.e.* existing leases] as shall expire within sixty years from the passing of the Act." Consequently what the Court has to see is, is there a future tenancy existing, which if it was a present tenancy would be within the fair-rent provisions of the Land Acts, or would have been within them except for any provisions in the contract of tenancy or other instrument prohibiting, restraining, or tending to prevent, the fixing of a fair rent? There is no doubt that the existing lease of 1900 contracts the tenant to use the holding as a pasture holding. There is also no doubt that the land is equally or more suited for mixed farming than pasture. I had no evidence of what provisions were in the contract of letting in 1891, or 1892, to Mrs. Keane, for seven years, but I will assume that the letting was for pasture. Therefore, it appears that from 1891 the holding was let for the purposes of pasture to Mrs. Keane, and that from the date of the letting she resided on the holding. The valuation of the holding is £90 5*s.*, so that she, being a resident tenant, would not be excluded from the fair-rent provisions of the Land Acts, by reason of the 5th section of the Land Act of 1896. At the date of the passing of that Act, which has been laid down as the crucial date for ascertaining the residence of the tenant, she was residing on the holding. I do not think the fact that she subsequently took a new lease of that holding has any effect. Also, I do not in any way wish to decide that if she had not been in occupation at the date of the passing of the Land Act of 1896 she would be excluded from the 65th section. Moreover, it is unnecessary in the present case to lay down the limit within which the provisions of the 65th section render void a contract to use the future tenancy for the purposes of pasture. However, I am satisfied that the tenancy of Mrs. Keane, now in the hands of her son, the existing tenant, is within the terms of the 65th section, and that he is entitled to fix a fair rent. I reverse the decision of the Sub-Commission, and remit the case to them, to fix a fair rent.

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The landlord appealed from this decision to the Court of Appeal.

W. M. Jellett, K.C., and *Hynes*, for the appellant.

R. F. Harrison, K.C., and *Fetherstonhaugh, K.C.*, for the respondent.

June 29.

HOLMES, L.J.:—

Mr. Commissioner FitzGerald, in the opening sentence of his judgment states briefly, but clearly, the nature of the claim of Patrick Keane. There is no doubt that Keane is a future tenant of the lands of Shancloon, being the holding before the Court; but notwithstanding this, he claims under the Land Act of 1909, section 65, to be entitled to have a fair rent fixed therefor, because his father, Mathew Keane, was a present tenant of a holding of which the holding of Shancloon formed a part, and because his father's tenancy was determined before that section became law.

There is no doubt that by lease of the 1st March, 1867, the then landlord demised to Mathew Keane the townlands of Shancloon and Immonbeg, containing about 289 acres, and valued in the Government Valuation at £134 per annum for a term of thirty-one years, or three lives, from the 1st June, 1863, at the yearly rent of £189. This lease was made pursuant to an agreement of the 1st September, 1863; and in neither the lease nor agreement was there anything restricting the use of the lands, or showing the purpose of the letting.

Mathew Keane remained tenant of the premises under the lease down to the year 1891, when he was evicted for non-payment of one year's rent, after which the holding was never redeemed. If there was no other evidence beyond what I have mentioned, Mathew Keane became entitled after the passing of the Land Law (Ireland) Act, 1887, and down to his eviction, to have a fair rent fixed for the holding, provided he was in occupation thereof.

I should be glad if this constituted the entire case, which might then be disposed of with little trouble—but there are two other documents which cause the first difficulty. Mr. Kean e

was the land agent of Mr. St. George before September, 1863, and continued to hold that position down to 1887. Although the property managed by him was of considerable extent, his remuneration was comparatively small. He probably more resembled a Scotch factor than the ordinary Irish agent; but I should be sorry to think him less trustworthy on this account. The two documents I have mentioned were preserved by the landlords, and produced by them on the hearing of the tenant's claim. It does not appear in whose handwriting the body of them is, but they are dated the 17th February, 1887, and it is admitted that Mathew Keane wrote with his own hand at the end of each of them, "I have read over this and it is true." There can be no doubt that the object of these documents was to show that the holding was let to be used mainly for the purposes of pasture. One relates to the lands of Shancloon, and states that this farm was held by Mr. G. Lynch as a grazing farm, with leave to break up from four to six acres with the landlord's consent, and to meadow sufficient for the keep of the stock; that Mr. St. George, not approving of the way Lynch was farming, let it to Keane, about 1861, as a grazing farm, with some additional privileges to those enjoyed by the former tenant, and promised to give him a lease of this and the adjoining land of Immonbeg, which lease was to give the tenant the same rights as he enjoyed before it was signed. The other document related to the lands of Immonbeg, which were stated to have been in the occupation of small tenants, some of whom went to America, and others were changed to another townland, and which were then laid down by Mr. St. George, as a grazing farm in grass-seed and clover, and let as such to Keane, with leave to break up four acres for green crop to feed stock in any part requiring improvement, and to meadow sufficient for the stock. These papers were written about twenty-five years after the letting; and strict accuracy could hardly be expected; but if the statements therein be true, as certified by the tenant, there is no doubt that the intention of the parties to the lease was, that the lands were being let mainly for the purposes of pasture.

As far as I can see, there is no ground for questioning the

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truth of these statements. The tenant in adopting them was acting against his own interest, for the value of the holding depended upon whether a fair rent could be fixed; and if the holding had not been let to be used mainly for the purposes of pasture, this could have been done at the fall of the lease, if not earlier, under the legislation then anticipated. Mathew Keane would not have retained the agency so long if he had not been a well-conducted man; and I think the two papers were prepared in anticipation of his ceasing to be agent. If the use of the holding as arranged at the time of the letting was what he declared it to be, it was natural, before his fiduciary position came to an end, for the landlord to require, and for him to give, a record which might prevent controversy and litigation when both were dead. I use the papers as testifying to the purpose of the letting; and I have now to consider the legal consequence of this finding of fact.

It is well settled that to establish that a holding was let to be used for pasture, it is not necessary to show that this purpose appearsb y covenant, or otherwise, in the instrument of letting. No doubt if a contrary or different purpose were shown thereby, that ought to be conclusive; but where, as in the present case, the lease gives no indication of the purpose, it can be proved by other evidence; and I know no better evidence to prove it than a deliberate statement in writing and against his own interest by the tenant. It is said that the actual user of the holding has not been consistent with the two documents; but I attach comparatively small importance to this where the landlord and tenant are also principal and agent. In such a case both parties, as long as they have confidence in each other, generally take a liberal view of their mutual rights and obligations; and I am unable to substitute inferences from user for the testimony of the tenant himself.

I therefore hold that Mathew Keane was bound by the contents of the papers signed by him, and that his son, the present applicant, claiming through him, is also bound thereby. The legal result would be that if the lease had never been broken, if the term of lives were still current, and if either Mathew Keane or his successor in title were now in occupation, he would not be

entitled to have a fair rent fixed under the existing statutes, the rateable value of the lands being over £100. The lease, however, has been long since put an end to. The lessee, having been adjudicated a bankrupt in 1889, was evicted for non-payment of rent in 1891, and the premises were never redeemed; but the Shancloon lands were demised to Matilda Keane, Mathew's wife, for a term of seven years. There is no doubt from the provisions of this lease, which we have seen, that this was a pasture letting; and it was followed by another lease of the same holding to the same lessee, dated the 20th December, 1900, for the term of fifteen years from the 1st of November, 1898. On the 3rd June, 1902, Mrs. Keane assigned the holding to her son, the present applicant, on his marriage; and although the lease contains a covenant against assignment, he has been given receipts in his own name. This lease also purports to demise the lands mainly for the purpose of pasture; but as the rateable valuation is under £100, and as the tenant actually resided on the holding, a fair rent could have been fixed thereon after the passing of the Land Act of 1896, if it had been a present tenancy within the meaning of the Land Acts. As, however, it was not so, the disability to have a fair rent fixed continued until the passing of the Land Act of 1909; and the important question for our decision is, whether such disability has been removed by the 65th section thereof.

I shall not read that section again. The answer to the question depends upon the first two lines—"Where a present tenancy was determined at any time before the passing of this Act." Do the words "present tenancy" mean a present tenancy to which the Land Acts applied when it was put an end to by the eviction? Now, if I were at liberty to speculate on the intention of the Legislature, and to draw an inference from the apparent policy of the enactment, I might say that this was the meaning.

Where a tenant having a right to have a fair rent fixed has had the misfortune to have his tenancy determined before exercising such right; and if his landlord through pity or kindness or any other reason, relets the holding or part of it to him or to a member of his family, it is not unreasonable that the new tenancy would have the same right attached to it as the old; but it would

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be rather anomalous if his misfortune had the effect of putting him in a better position than before.

I have, however, long since given up the attempt to consider what would be reasonable or what would be anomalous in construing the provisions of modern statutes. Opinions differ so widely on such matters that the only safe guide is to be found in what is actually expressed. Now, although up to the determination of Mathew Keane's tenancy, it was not, according to the view I take of the evidence, a tenancy to which the Land Acts applied, it was a present tenancy as defined by the Act of 1881, and there is nothing to be found in the 65th section to limit the definition. If the intention had been to confine the enactment to present tenancies that had before they were determined been within the Land Acts, this could easily have been done by the addition of a few words. For instance, the power given to the Land Commission might have been made subject to the provisions of the Land Law Acts in force when the tenancy was determined, but it is made subject to the provisions of the Land Law Acts without more; and I am of opinion that this must mean the Land Law Acts in force at the time of the application. Therefore, if Patrick Keane, who at the date of the application was tenant in occupation of portion of the lands demised by the lease of 1867, fulfils condition (*b*), he would, in my opinion, be entitled to have a fair rent fixed subject to the provisions of the Land Law Acts in force at the date of his application.

Condition (*b*) is clumsily expressed, and its construction is obscure. Mathew Keane never occupied as tenant any part of his holding after his eviction, and when he died in 1903 his son Patrick was in occupation of the portion thereof demised to his mother by the lease of 1900. He had acquired such occupation by a transfer from her in 1902; and, notwithstanding the covenant against assignment in her lease, I hold that he occupied as tenant, inasmuch as the receipts for rent were given in his name. Such was the history of the new tenancy; but condition (*b*) does not refer to the new tenancy at all. It relates to a person who would have been entitled, whether under the will or as one of the next-of-kin or issue of the tenant, to the original holding, or any distributive share therein, had the present tenancy not been

determined. This, I think, must mean, if it means anything, that we are to assume that the old tenancy continued in existence down to the death of the old tenant, and to ascertain on this assumption whether the applicant would at and after such death have become entitled to the holding, or a share of it. Mathew Keane made no will, and, as I have not seen his lease, I do not know whether the demise was to him and his heirs. But the applicant was his eldest surviving son, and on the fanciful hypothesis I have stated he would be entitled either to the entire holding as special occupant, or to a distributive share of it as one of the next-of-kin of his father.

I, therefore, am of opinion that on his father's death he fulfilled condition (*b*), and although I have found against him as to the purpose of the letting, I hold that, on the true construction of section 65, he is entitled to have a fair rent fixed.

The appeal ought, therefore, to be disallowed with costs.

SIR S. WALKER, L.C., concurred in the judgment of HOLMES, L.J.

CHERRY, L.J. :—

I arrive at the same conclusion, though by a slightly different road from that by which Holmes, L.J., has reached it. I am not satisfied upon the evidence that the holding demised by the lease of 1st of March, 1867, was excluded from the fair-rent provisions of the Irish Land Acts. There is not a word in the lease itself to indicate that the purpose of the letting was for pasture, and there are no restrictive covenants as to the user of the lands demised, contained in it. The lands themselves are shown, by the report of the assessor, to be best suited for mixed farming; and the parol evidence shows, without any attempt at contradiction, that they have always been used in this way, since, at all events, the date of the lease. The landlord, however, relies upon two documents signed by the present tenant's father, Mathew Cane (or Keane), the original lessee, as proving that the purpose of the letting was for pasture, and of course it is clearly established by many decisions of this

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Court that the purpose of the letting may be established by extrinsic or collateral evidence, provided such evidence is not inconsistent with the terms of the written contract (if any) under which the lands are held: *Battersby* v. *Nicholson* (1) and *Fulham* v. *Garry* (2) are the two leading authorities for this proposition.

There is no doubt that these two documents are admissible in evidence, for what they are worth. They are not in the handwriting of the tenant, but they were signed by him, and his signature is proved by his son, the present applicant. The documents are therefore admissible evidence upon two grounds—(1) as admissions by a predecessor in title of the present applicant; and (2) as statements by a deceased person against his interest. But they are only admissible evidence. They are not in any way conclusive evidence of the facts stated in them, and as they appear to me to contradict all the other evidence in the case, I have come to the conclusion that they are not trustworthy documents.

I confess that I look with the greatest suspicion upon the circumstances under which the tenant's signature to these documents was obtained. They are dated the 17th February, 1887, and were evidently prepared by some person in the employment of the landlord, most probably by the witness to the documents, William Saulsbury, as to whom we have no evidence whether he is living or dead. At that time legislation was pending to admit leaseholders to the benefit of the provisions of the Land Act, 1881. The Act conferring this privilege actually passed into law on the 23rd August, 1887. I have no doubt whatever that the object, and the sole object, of having these two documents signed, by a tenant who two years afterwards became a bankrupt, was to prevent him applying to have a fair rent fixed. Admissions obtained in this way are not very reliable. I prefer to follow the oral evidence, which contradicts these documents in every detail, and which is confirmed by the written evidence contained in the promise of a lease made on the 1st September, 1863, and the lease itself executed on the 1st March, 1867. The lease

(1) 22 L. R. Ir. 38. (2) 26 L. R. I. 598.

is not mentioned or referred to in either of the documents, but the written promise of a lease is referred to in the one relating to Shancloon, and quite inaccurately. "Mr. St. George told me," it says, "he would give me a lease, and in 1863 he gave me the promise of a lease in writing of this and the adjoining townland of Immonbeg, which lease was to give me the same rights I enjoyed before it was signed by Mr. St. George." Neither the lease, however, nor the letter promising a lease, makes any reference to any rights or restrictions on the user of the lands, such as the tenant says, in the earlier part of his statement, were imposed by the parol contract of 1861. I think it is safer, therefore, to trust to these two documents themselves than to a manifestly erroneous account of what they were to contain.

Having come to the conclusion that the letting by the lease of 1867 was not wholly or mainly for the purpose of pasture, it is unnecessary for me to consider the question discussed by FitzGerald J., as to whether the "present tenancy," referred to in sub-section (1) of section 65 of the Act of 1909, may not be one to which the fair-rent provisions of the Act of 1881 do not apply, but I fully agree with him that the new tenancy must be one to which, but for the fact that it is a future tenancy, they would so apply. There appears to be no doubt of this in the present case. Although the new letting of 1900 is clearly for the purposes of pasture, the valuation is under £100, and the tenant was residing upon it at the date of the passing of the Act of 1896. The present tenant also resides upon it, so that the excluding provisions of section 5, sub-section 1 (*c*), do not apply.

As to the status of the present applicant under sub-clause (*b*) of section 1 of the 65th section of the Act of 1909, another question arises which apparently was not noticed in the hearing before the Land Commission. The lease of 1867 is for lives, and is limited to the heirs of the lessee. It would, therefore, pass on his death, if he made no will, to his heir-at-law as special occupant. No evidence was given in the Land Commission as to who was the heir-at-law, but the present applicant, on being examined before us, proved that he was the eldest son who survived his father, and that his elder brother died unmarried in the lifetime of his father. As Mathew Keane made no will, the present applicant therefore

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comes within the express words of sub-clause (*b*), as he would have been entitled, on the death of his father, if the holding under the lease of 1867 had not been evicted, to the whole holding as his "issue."

Upon the entire case I am, therefore, satisfied that the present applicant has shown himself to be within all the provisions of section 65, and that he is entitled to have a fair rent fixed. I agree, therefore, that the decision of FitzGerald, J., should be affirmed.

Solicitors for the landlords: *Conway & Quinn.*
Solicitor for the tenant: *J. A. Glynn.*

R. ST. J. C.

REILLY, TENANT; LYNCH BLOSSE, LANDLORD (1).

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1912.
May 15, 17.

Land Law (Ireland) Acts—Fair rent—Determination of present tenancy prior to the passing of the Irish Land Act, 1909 (9 *Edw.* 7, *c.* 42)—*Construction of section* 65 (1)—"*Subject to the provisions of the Land Law Acts*"—*Date at which applicability of the Acts is to be ascertained—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *section* 5 (1) (*c*) (ii)—*Residence of tenant on adjoining holding.*

To entitle an applicant, otherwise duly qualified, to have a fair rent fixed under section 65 (1) of the Irish Land Act, 1909, it is sufficient if, at the time of the application, the lands come within the provisions of the Land Law Acts in that behalf. Accordingly, where a present tenancy within the definition of the Land Law (Ireland) Act, 1881, was after the Land Law (Ireland) Act, 1896, and prior to the passing of the Irish Land Act of 1909, determined by notice to quit, and the holding was relet for the purposes of pasture to a son of the outgoing tenant, who at the time of the application hereinafter mentioned was presumed to be dead; and the new tenant, at the date of his application to have a fair rent fixed in respect of the holding, was in occupation thereof, and resided on an adjoining holding of which also he was the occupying tenant.

Held, reversing the decision of FitzGerald, J., that a fair rent should be fixed. *Concannon and St. George, Landlords; Keane, Tenant*, ante, p. 429, followed. *Gaffney, Tenant; Fetherstonhaugh, Landlord* ([1900] 2 I. R. 417, 422), does not apply to cases under section 65 (1).

APPEAL by the tenant, William Reilly, from an order of FitzGerald, J., dated the 16th March, 1912, affirming an order of a Sub-Commission, dismissing his application to have a fair rent fixed on the lands of Carrownahane, in the county of Mayo, containing 113A. 3R. 12P., held at the yearly rent of £90. From the evidence given at the re-hearing before FitzGerald, J., it appeared that the farm had been held by Lord John Browne in 1881, and up to the middle of October, 1882, when he surrendered it to the landlord, and by an agreement in writing, dated 17th October, 1882, made between the then landlord,

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

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Sir Robert Lynch Blosse, of the one part, and John Reilly, who was then a bailiff on the estate, of the other part, the farm was let to John Reilly, subject to a provision that it should be used for pasturage and meadow only, and that all hay should be consumed on the premises. John Reilly at the time held another adjoining farm on the estate, called in the proceedings "the home farm," on which he resided, and both farms were worked by him together. In 1889 John Reilly went to America, leaving his widow, Margaret Reilly, and his son, the appellant, in possession of both farms. In 1891, on appellant's marriage, his mother, who had been recognized by the landlord as tenant of the home farm, assigned it to appellant in consideration of £40, part of his wife's marriage portion, and an agreement for her own maintenance.

In 1896 William Reilly applied to the landlord's agent to be made tenant of the pasture holding. His father, John Reilly, had not been heard of after 1890, and it was unknown whether he was still alive. Notice to quit directed to John Reilly was served upon William Reilly, and on its expiration possession of the holding was formally given to the landlord, and it was re-let to William Reilly by agreement in writing, dated 8th June, 1897, who thenceforward paid the rent for both farms, was the recognized tenant of both, and resided on the home farm, working both holdings together.

In July, 1910, an application by William Reilly to fix a fair rent of the pasture holding was dismissed on the ground that he was a future tenant, but without prejudice to any application he might be advised to make under the 65th section of the Irish Land Act, 1909. Fitz Gerald, J.'s, order was affirmed on appeal (1). An originating notice was accordingly served by William Reilly, and was dismissed by a Sub-Commission. A rehearing having taken place at Castlebar, on February 12th, 1912, FitzGerald, J., on the 16th March, 1912, delivered judgment as follows:—

(1) See 44 Ir. L. T. R. 247, where the hearing in the Court of Appeal is reported.

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REILLY, *Tenant*; LYNCH BLOSSE, *Landlord.*

In the case in which Sir Henry Lynch Blosse is landlord, and William Reilly is tenant, John Reilly was a present tenant of his home farm, which adjoins the farm before the Court. The farm before the Court I refer to as the pasture farm. It consists of 113A. 3R. 13P., and the rent is £90. Lord John Browne had been the tenant of the pasture farm up to the middle of 1882, when he surrendered it. In October, 1882, the pasture farm was let to John Reilly, who was then bailiff on the estate, under a written agreement that the holding should be used for pasturage and meadow only, and that all hay should be consumed on the premises. As the tenancy in Lord John Browne was subsisting at the date of the passing of the Land Act of 1881, the letting to John Reilly in 1882 created a present tenancy in him. In 1889, under circumstances the particulars of which did not appear, John Reilly left this country for America, and some short time after he appears to have been heard of in Boston, but he has never been heard of since. John Reilly left behind him in this country his wife, Margaret Reilly, and his only child, William Reilly, who is the tenant before the Court. Margaret Reilly and William Reilly continued living on the home farm after John Reilly left the country. Margaret Reilly's name appears to have been inserted in the receipts as tenant of the home farm, while John Reilly's name was kept as tenant of the pasture holding. The circumstances under which Margaret Reilly's name was put in as tenant of the home farm did not appear in evidence; but when Mr. Deane became agent in 1893, Margaret Reilly's name was returned to him as tenant of the home farm, while John Reilly's name was still kept as tenant of the pasture farm. In 1891, William Reilly married, and Margaret Reilly assigned to him the home farm, getting part of the fortune, and a covenant to support her during life. In 1896, William Reilly went to Mr. Deane, and wanted to get his name put in as tenant of the pasture holding. Mr. Deane told him he could not do so unless the tenancy in John Reilly was determined. They then apparently agreed—certainly it was a friendly proceeding, and there is no controversy about it—that a notice to quit, directed to John Reilly, should be served upon William Reilly on

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the holding. The notice to quit was served on the 18th of May, 1896. After the expiration of the notice to quit possession of the pasture holding was given up by William Reilly to the bailiff of the landlord. No further legal proceedings were taken, but on the same day the pasture holding was let to William Reilly under a new written agreement from the 1st May, 1897, at the yearly rent of £90, and the agreement provided that the holding was to be used for grazing and meadow only, and that no hay was to be removed from the holding. In fact, the agreement of 1897 is in all substantial conditions the same as the agreement of 1882, and the whole transaction was carried out by the desire of William Reilly.

On the 20th July, 1910, I decided that the effect of this transaction was to make William Reilly a future tenant of the pasture holding, and I dismissed his application to fix a fair rent thereon, but without prejudice to any application he might be in a position to maintain under the 65th section of the Act of 1909. I could not have then dealt with his application to fix a fair rent as an application by a future tenant under the Act of 1909, as the proceedings had been commenced before the passing of the Act of 1909. The decision of the 20th July, 1910, has been since affirmed by the Court of Appeal. The tenant then served a new originating notice claiming as a future tenant under the Act of 1909 to have his fair rent fixed, and on the 12th June, 1911, the Sub-Commission dismissed this application on the ground that the holding was let to be used wholly or mainly for the purpose of pasture; and the case has now come before me on a re-hearing by way of appeal from the decision of the Sub-Commission.

The landlord's contention is that the crucial date on which the facts are to be ascertained is the passing of the Land Act of 1896, that at that date John Reilly could not have had a fair rent fixed, because, although he was tenant of the pasture farm, he was not residing on the adjoining home farm, which he had left in 1889; nor was he tenant of same, his wife's name having been put into the receipts after his departure, and his wife having, in 1891, assigned the home farm to William Reilly, the present applicant; also, because William Reilly, although now tenant of the pasture farm and of the home farm, was not tenant of the pasture farm at the crucial date in 1896.

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In the case of *Maguire* v. *King* (1) it was decided that the residential holding must at the crucial date be the holding of the tenant of the pastoral holding, and that it was not sufficient if the residential holding belonged to the father of the tenant of the pastoral holding, and that he resided there with his father. The decision in *Maguire* v. *King* (1) was considered by the Land Commission as binding on them in *Gaffney* v. *Fetherstonhaugh* (2), and although the decision of the Land Commission in the latter case was reversed by the Court of Appeal, it was solely on the ground that the Act of 1896, which became law subsequent to the decision in *Maguire* v. *King* (1), had substituted as the crucial date the date of its passing for the date of the passing of the Land Act of 1881. Therefore, I must consider *Maguire* v. *King* (1) as binding on the Land Commission. It is in some ways the converse of the present case. Then the question arises: How far the date of the passing of the Land Act of 1896 applies to a future tenancy which in this case was created after the date of the passing of the Act, although at the time of the passing the future tenant of the pasture farm was in occupation of, and residing as tenant on, the adjoining home farm. The words of the 65th section of the Act of 1909 are:—

> "Where a present tenancy was determined before the passing of this Act, the Land Commission may, subject to the provisions of the Land Law Acts, fix the fair rent in like manner as if the applicant was a present tenant."

Do the words "subject to the provisions of the Land Law Acts" show the intention that the conditions must be exactly the same in the case of a future tenant as in the case of a present tenant? Or do the words "as if the applicant was a present tenant" mean that the future tenancy, for the purpose of sustaining the application to fix a fair rent, should be projected backwards in date, and considered as if existing at the passing of the Land Act of 1881. I do not think this could be the case, as present tenancies can be created any time after the Land Act of 1896. In the case of *Concannon* v. *Keane* (3)—not yet reported, but

(1) 28 Ir. Law Times Reports, 13.
(2) [1900] 2 Ir. Rep. 417.
(3) Since reported, *ante*, p. 429.

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the judgments delivered in which I have been favoured with by the reporter—the Court of Appeal decided that where a present tenancy was determined, which owing to its valuation would have been excluded from the fair rent provisions of the Land Acts as a holding let to be used for the purposes of pasture, and where a future tenancy for the purposes of pasture was subsequently created in part of the holding, which on account of its lesser valuation, and because the tenant of the future tenancy resided on it at the passing of the Land Act, 1896, would, if it had been a present tenancy, have been within the fair-rent provisions of the Land Acts, the tenant of such future tenancy could maintain an application to fix a fair rent under section 65 of the Act of 1909. I refer to this decision because it shows that the words in the 65th section of the Act of 1909, "subject to the provisions of the Land Law Acts," mean, as stated by Lord Justice Holmes, "subject to the provisions of the Land Law Acts in force at the date of the application to fix the fair rent"; also that the fact that John Reilly could not have sustained an application to fix a fair rent on the pasture farm before the present tenancy determined, owing to his having ceased to reside on the home farm, would not have prevented the tenant of the future tenancy maintaining such an application if he fulfilled the necessary conditions at the crucial date.

Furthermore Lord Justice Cherry, in his judgment, although deciding the case on different grounds, states—"Although the new letting of 1900 is clearly for the purposes of pasture, the valuation is under £100 and the tenant was residing upon it at the date of the passing of the Act of 1896." From this I would infer that he was of opinion that the condition as to residence at the date of the passing of the Act of 1896 was necessary in the case of a future tenancy.

I must hold that the date at which I am to ascertain whether the holding let for pasture adjoins the holding upon which the tenant resides is the same in the case of a future tenancy as of a present tenancy—the date of the passing of the Land Act of 1896. At that date William Reilly resided on the holding adjoining the holding let for pasture, but was not then tenant of the holding let for pasture. The furthest it can be put is that at the passing of the Act of 1896, he resided on the home

farm and was in physical occupation of the adjoining pasture farm, although not tenant of it. I think that is not sufficient; and consequently I do not think he can maintain his application to fix a fair rent on the pasture holding. I may add that I do not think any question arises under sub-section 2 of the 65th section. There is no substantial difference in the contract of tenancy made with William Reilly and that previously made with John Reilly. I affirm the decision of the Sub-Commission.

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1911.
REILLY, *Tenant;* LYNCH BLOSSE, *Landlord.*

The tenant appealed.

Appeal.
1912.
May 15.

Conner, K.C., and *Devitt*, for the appellant:—

Since the decision of this Court in *Concannon and St. George, Landlords*; *Keane, Tenant* (1), it is settled that the crucial time at which the *status* of a tenant, applying to fix a fair rent under section 65 (1) (*b*) of the Land Act of 1909, is to be ascertained is the time of the application; the real question in all such cases being whether the holding at that time was subject to the provisions of the Land Law Acts (2). The argument on the other side will be—A fair rent can only be fixed in respect of a pasture holding under section 5 of the Act of 1896, and the conditions in sub-section (1) *c* (ii) must have existed at the passing of that Act. That is rather an absurd argument when applied to a tenancy created after the Act of 1896 had been passed. But on the 15th August, 1896, John Reilly's family were residing on the adjoining home farm. If John was then alive, that is a sufficient residence by him to satisfy the terms of the sub-section, clause *c* (ii). It is the only manner in which a tenant temporarily absent can reside on his holding. This interpretation has been given in Registry Appeals to the sections of the Franchise Acts requiring residence as a qualification, and this would obviously be the construction given to the word "resides" in section 7 (1) *a* of the Act of 1896.

The service of the notice to quit was quite regular, and sufficient to put an end to the tenancy pre-existing in John Reilly:

(1) *Ante*, p. 429. (2) Section 65 (1) is given *in extenso*, *ante*, p. 430.

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Tanham v. *Nicholson* (1) : see judgments of Lord Hatherley, L.C., at p. 571, and of Lord Westbury, at p. 573. In *Doe* d. *Neville* v. *Dunbar* (2), Abbott, C.J., held that such service was "absolutely sufficient," that he had no doubt about it, and that, "were it to be held otherwise, a landlord would have no means of determining a tenancy, if his tenant happened to be absent from his house at the time when it was necessary to serve the notice."

If section 5 of the Act of 1896 is excluded, it must be excluded altogether, and in that case the tenant would come clearly within section 65 of the Act of 1909.

McGonigal, K.C., for the respondent :—

In 1896 John Reilly's widow was getting receipts in her own name for the home farm, and had a fair rent fixed in respect of it. [*Conner, K.C.*, objected to the latter statement, as it was not proved before FitzGerald, J., or included amongst the documents in the schedule to his order. A certificate fixing the fair rent of the home farm at £17 yearly was, however, now produced.] She assigned to her son William (the appellant) the whole interest in that judicial tenancy, and he is estopped from denying this. He took receipts for the pasture farm, *i.e.* the holding with which these proceedings are conversant, in his father's name up to 1897, and the father, John Reilly, was unquestionably the tenant of it up to 1897. "Subject to the provisions of the Land Law Acts" in section 65 (1) of the Land Act, 1909, means subject to those Acts at the date of the application if you will, but with all their inclusions and exclusions. The section sought to do away with the evictions which had so largely taken place, to restore the evicted tenants and the evicted holdings to their old *status*. But if the holding was excluded by the Land Acts, or a particular Land Act, from the operation of the Land code, section 65 of the Act of 1909 gives no aid towards conferring on it a new life. If you have to resort to section 5 of the Act of 1896 to get within the Acts, you must submit to the exclusions in the section; and *Gaffney, Tenant*; *Fetherstonhaugh, Landlord* (3), is a

(1) L. R. 5 H. L. 561.
(2) Moo. & Malk. 10.
(3) [1900] 2 I. R. 417, 422.

decision of this Court, that the word "is" before "ordinarily" in section 5 (1) (*c*) ii of the Act of 1896 speaks from the date of the passing of the Act in which they occur. The same interpretation must be given to "does" in the first limb of the clause.

Conner, K.C., in reply:—

Assignment is not an estoppel. It only assigns whatever right the party has. Mrs. O'Reilly's assignment was an assignment of a merely possessory title. Section 58, sub-sections (1), (3), (4), of the Act of 1881 are repealed by the 52nd section of the Act of 1896, so if section 5 of that Act were out of the way, there would be an unquestionable right to fix a fair rent of a pastoral holding.

May 17.

THE LORD CHANCELLOR:—

The appellant in this case, a tenant of Sir Henry Lynch Blosse, made an application in the prescribed manner to have the fair rent fixed of a holding let to be used wholly or mainly for the purpose of pasture. He resides on a similar farm adjoining the holding in question, and the latter is ordinarily used with the residential holding. He was tenant of both holdings to Sir Henry Lynch Blosse at the date of his application, and the circumstances of the case are stated to bring it under the operation of section 65 of the Land Act, 1909. At the time of the application, it is admitted, the tenant and his holdings fulfilled the conditions prescribed by section 5 of the Land Act, 1896. But the point was raised that they did not do so at the date of the Act of 1896, namely, August 15th, 1896, and that he was precluded accordingly from taking advantage of section 65 of the Land Act, 1909, although coming within its provisions in every other respect. The application was dismissed on the contention raised, and on an appeal before Mr. Commissioner FitzGerald, the order of the Sub-Commission was affirmed. The present appeal is from that order, and the question involved relates to the real meaning of section 65 of the Land Act, 1909. Is there that limitation in its operation placed on it by Mr. Commissioner FitzGerald,

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affirming the order of the Sub-Commission to the same effect? The question is obviously of importance, though very many cases may not be affected by it. There was a case depending on the construction of section 65 of the Land Act, 1909, namely, *Concannon* v. *Keane* (1), decided in this Court in the month of June, 1911, and it is a matter of regret that no report of it has as yet appeared in our Law Reports. Had it been reported, it is possible that the present appeal would never have become necessary. The question was also raised there, whether the tenant was eligible to fix a fair rent, unless he could show that the conditions of section 5 (1) (*c*) (ii) of the Act of 1896 were fulfilled at the date of the passing of that Act, and there was evidently a full argument upon it. On the hearing of this appeal in Court, I formed the view I am now about to express. But I had the opportunity since of reading the judgments pronounced by the Lords Justices on that occasion, and I understand that the late Lord Chancellor, who was unfortunately indisposed and could not attend on the occasion of the judgment, agreed with the views expressed by Lord Justice Holmes. Lord Justice Holmes pointed out that the only condition existing in the section was contained in the first two lines of the section, and, while that existed, no further limitation of the section existed. That I think was the proper view of the section; and no limitation, in the view of Lord Justice Holmes, with which view I fully concur, was introduced upon the *prima facie* meaning of the section by the words so much relied on, namely, "subject to the provisions of the Land Acts." The provisions of the Land Acts must no doubt be taken into account in the hearing of any application to fix a fair rent under section 65; but a reasonable construction must be placed upon these words, and not a construction that would render the section a nullity in many cases intended by Parliament to be within its range. I fully agree with the judgment of Lord Justice Holmes in *Concannon's Case* (1), and I hold with him that the question of satisfying the conditions provided under section 5 (1) (*c*) (ii) of the Act of 1896 applies

(1) Since reported, *ante*, p. 429.

not to the time when that Act was passed, but, in such circumstances as exist in the present case, to the date on which the application was made by the tenant to fix a fair rent. The point is one of importance, and I think our duty in the matter is best carried out by a short and specific judgment on the question; and because of the view I take, and the illusory character the section otherwise would bear, I think the order of Mr. Commissioner FitzGerald must be reversed, and a declaration made that the disqualification relied on against the appellant does not apply in the case.

HOLMES, L.J. :—

The order from which this appeal has been taken dismissed an application to fix a fair rent for a pasture farm consisting of 113 acres, held at the annual rent of £90. Lord John Browne had been tenant for some years of this farm until he surrendered it in 1882, when it was let to John Reilly, the then bailiff of the estate, under a written agreement that the holding should be used for pasture and meadow, and that all hay should be consumed on the premises. The letting was therefore a present tenancy under the Land Act of 1881 ; but was excluded from the right to have a fair rent fixed by section 58, sub-section (3), of that statute. John Reilly also held from the same landlord a small adjoining holding, called in this case the home farm, on which he resided with his wife and only child, the present applicant. In 1889, John Reilly went to the United States, for some reason or purpose of which there is no evidence, and was last heard of in the following year. His wife and son, however, continued to reside on the home farm, and to work the pasture farm, paying the rent for the latter in the name of John Reilly down to the year 1897. The wife's name was put into the receipts for the rent of the home farm under circumstances of which we are ignorant ; and on the marriage of her son in 1891, she assigned to him that holding, since which date I assume his name has appeared as that of the tenant in the landlord's books. It is, however, certain that neither the assignment nor change of the tenant's name was assented to by John Reilly, and that at what has been called the

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crucial date—the 15th August, 1896—he was the legal tenant of both farms. Mr. Conner has argued that up to and at that date he actually resided on the home farm; and in the absence of all knowledge as to why he went to America, and of what kept him there, much might be said in favour of the proposition that the residence of the wife and son was his residence. A man's residence is often a place where he spends but little of his time; and many men have two or three residences. John Reilly lived for many years on the home farm with his family, and at length he went away leaving them behind, allowing them to use it as they had always done. Can we, without anything more, hold that by his departure it had ceased to be his residence? I refer to this argument, and ask this question, because I think when an application similar to the present was made by William Reilly, the members of the Court assumed that if John Reilly had applied to have a fair rent fixed for the pasture farm before his tenancy was determined by notice to quit, he would have been entitled to have his application granted. The point, however, was not actually determined; and it is unnecessary to decide it in the present appeal, which, in my opinion, has been ruled, at least by the majority of this Court, in *Concannon* v. *Keane*, not yet reported (1). The application to which I have referred arose in the following circumstances: In the year 1896, William Reilly, the present applicant, applied to the landlord's agent to have him made tenant of the pasture holding, and was told that this could not be done, unless his father's tenancy was determined. Accordingly by arrangement between them, a notice to quit addressed to John Reilly was served on the son on the 18th May, 1896. After its expiration formal possession was given to the landlord's bailiff, and on the same day the pasture holding was let at the yearly rent of £90 to the son on a written agreement, containing a term as to grazing and meadow similar to that contained in the old agreement of 1882. In this state of things, William Reilly, a short time previous to the Irish Land Act, 1909, applied to have a fair rent fixed on the pasture holding, with the result that he was defeated by a majority of this Court on the ground that the transaction

(1) Since reported, *ante*, p. 429.

following the notice to quit of 1896 created a future tenancy in the applicant. Cherry, L.J., differed from the then Lord Chancellor and myself in holding that there was no new tenancy, and was therefore of opinion that a fair rent ought to be fixed—a conclusion from which the other members of the Court did not dissent, if the old tenancy in the pasture farm continued (1). It is probable, however, that the discussion of the case was confined to the one point; and I shall leave the question of what is actual residence to be considered, if and when it arises hereafter, for, apart from it, the present case is governed by our decision in *Concannon* v. *Keane*, not yet reported (2). In that appeal, the majority of the Court held that a tenancy that had been evicted, although a present tenancy, was not one for which a fair rent could have been fixed; and it was argued that therefore it did not come within section 65 of the Act of 1909. I asked in delivering a judgment in which the then Lord Chancellor agreed, "Do the words 'present tenancy' in that section mean a present tenancy to which the Land Acts applied when it was put an end to?" And I went on to say that if I were at liberty to speculate on the intention of the Legislature, and to draw an inference from the apparent policy of the enactment, I might come to that conclusion. I added, however, that I must be guided by the language of section 65, and that I could find nothing therein to thus limit it. I was therefore obliged to hold that "subject to the provisions of the Land Law Acts" meant the Land Law Acts in force, not at the time when the present tenancy was put an end to, but at the time of the application to fix the fair rent.

Having now reconsidered the point, I have come to the same conclusion, and I apply it to the present case. The present tenancy of John Reilly came to an end in 1897, when William, his sole next-of-kin, became future tenant of the pasture farm, and has since occupied it, actually living on the adjoining home farm, of which he is also now the tenant, as his father is presumed by our law to have died more than twelve years ago. He therefore comes within the words of sec. 65, sub-sec. (1) (*b*),

(1) 44 Ir. L. T. R. 247.

(2) Since reported, *ante*, p. 429.

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of the Act of 1909; and, in accordance with the construction of the majority of this Court given to the provision in *Concannon* v. *Keane* (1), is entitled to have a fair rent fixed.

CHERRY, L.J.:—

I agree. The question which we have to determine in this case is whether the applicant, William Reilly, is entitled, under the 65th section of the Irish Land Act, 1909, to have a fair rent fixed in respect of the holding described in the originating notice.

There is no doubt that his father, John Reilly, was a "present tenant" of this holding up to the year 1897, and that his "present tenancy" was determined by notice to quit in that year.

John Reilly, it is also agreed, must be now presumed to be dead, having been absent from the country and not heard of for more than twenty years. William Reilly, his son, is one of his next-of-kin, and is in occupation of this holding as tenant: *prima facie*, therefore, he is entitled to have a fair rent fixed in respect of the holding, though his tenancy therein is a future one.

The jurisdiction of the Land Commission, however, to fix a fair rent under section 65 of the Act of 1909 is declared to be "subject to the provisions of the Land Law Acts," by which I think is meant that if the new tenancy be one which, if it were a present tenancy, would be excluded from the fair-rent provisions of the Land Acts, the occupier is not to have the privilege of having a fair rent fixed under the provisions of that section.

Now, in the present case, the letting to William Reilly in 1897 was clearly a letting for the purpose of pasture, and as such, if it were a present tenancy (although the rateable value of the holding is less than £100), it would be excluded from the rent-fixing provision of the Irish Land Acts by the 5th section of the Act of 1896, unless it could be shown that the tenant actually resided upon the holding, or upon a holding adjoining or ordinarily used therewith. In *Gaffney* v. *Fetherstonhaugh* (2) it was held by this Court that the crucial date for determining, in the case of present tenancies, whether the condition as to residence

(1) Since reported, *ante*, p. 429. (2) [1900] 2 I. R. 416.

laid down in the 5th section of the Act of 1896 was complied with or not, was the date of the passing of that Act, namely, 15th August, 1896. Mr. Justice FitzGerald has held that that decision applies to the present case, although the tenancy now before the Court was not in existence on the date referred to. I cannot agree with him in this conclusion. It appears to me that when we are dealing with tenancies which did not commence until after the date referred to, it would be contrary to reason to apply the rule in *Gaffney* v. *Fetherstonhaugh* (1), as to the tenant's residence, as it would necessarily exclude all such tenancies from the purview of the sub-section. We must, I think, according to any rational interpretation of the section, fix the crucial date at some time during the existence of the tenancy. It is immaterial in the present case to determine what that date is, inasmuch as the tenant, William Reilly, has been residing upon the holding which immediately adjoins the one now before the Court, from the day that the tenancy commenced, down to the present time. Whatever date, therefore, we fix within these limits as the crucial one, he necessarily fulfils the prescribed conditions.

For these reasons I am of opinion that the holding of William Reilly is not excluded from the rent-fixing provisions of the Land Acts by the 5th section of the Act of 1896, and that accordingly he is entitled to have a fair rent fixed under the 65th section of the Act of 1909. The case must be remitted to the Land Commission for this purpose.

Solicitor for the tenant: *M. V. Coolican.*
Solicitors for the landlord: *Kelly & McGonigal.*

W. G.

(1) [1900] 2 I. R. 416.

Appeal.
1912.
April 29, 30

IN THE MATTER OF THE ESTATE OF ALICE THOMSON, OWNER AND PETITIONER.

Mortgage—Construction—Habendum—Proviso for redemption—Effect of in charging prior mortgage debts on additional property.

By deed dated 15th April, 1872, A mortgaged certain lands to B (a corporate body) to secure £32,000. By deed dated 31st October, 1872, A mortgaged the same lands to B to secure a further sum of £5000. The deed contained a proviso for redemption on payment of the said sums of £32,000 and £5000. By a third deed dated 9th July, 1874, reciting the two prior mortgages, A mortgaged the lands therein, together with other lands at N., to B to secure a further sum of £6000. The habendum in the last-mentioned deed was "to have and to hold the said lands and hereditaments hereinbefore expressed to be firstly granted," *i. e.* the lands mortgaged in 1872 "to B, its successors and assigns, to the use of B, its successors and assigns for ever, but subject nevertheless," to the said recited mortgages, "and also to the proviso for redemption hereinafter mentioned, and to have and to hold the said lands and hereditaments and all other the premises hereinbefore expressed to be hereby secondly and thirdly granted," *i. e.* the additional lands at N. "to B, its successors and assigns, to the use of B, its successors and assigns for ever" subject to the rents and covenants in certain fee-farm grants, "and subject to the proviso for redemption hereinafter contained; that is to say, provided, and it is hereby agreed and declared, that if the said A, his executors, administrators, or assigns, shall on the 4th day of October, 1874, pay to B, its successors and assigns, the said sum of £6000, with interest at the rate of £5 10*s.* per cent. per annum . . . . then the said B, its successors or assigns, shall, at any time thereafter, upon the request and at the costs of the said A, his executors, administrators, or assigns, and upon payment also of said sum of £32,000 and interest, so secured as aforesaid by the said indenture of the 15th day of April, 1872, and also of said sum of £5000 and interest, so secured as aforesaid by the said indenture of 31st October, 1872, reconvey the said lands, hereditaments, and premises, hereinbefore expressed to be granted and released, unto and to the use of the said A, his heirs and assigns, or as he or they shall direct"; and it contained a proviso that, notwithstanding anything therein contained, B should not be compelled to reconvey the lands or any part thereof until the aforesaid sums of £32,000 and £5000, as well as the said sum of £6000, should be fully paid and satisfied. The lands, the subject of the mortgages of 1872, were afterwards sold to the tenants in the Land Commission Court, and the other lands, the subject of the mortgage of 1874,

were about the same time sold in the Land Judge's Court on the petition of A as owner.

Held, by the Court of Appeal, that by the deed of 9th July, 1874, all the three mortgage debts were charged on the additional lands at N : *Mostyn* v. *Lancaster*; *Taylor* v. *Mostyn* (23 Ch. D. 583) applied.

APPEAL by the owner from the decision of Ross, J., *ante*, p. 194. The deed of the 9th July, 1874, is partly stated in the report below. The habendum and proviso for redemption will be found stated verbatim in the judgment of the Lord Chancellor, *infra*, p. 463.

G. W. Walker, *K.C.*, and *Brunskill*, for the appellant :—

The deed of 1874 is a deed of further charge. Even if the redemption clause were wiped out, under the ordinary law of consolidation of mortgages, the three mortgage-debts became chargeable on the Newry property. See note on this subject in Encyclopædia of Laws of England (ed. 1908), vol. 9, p. 436. It is distinct from tacking. The right to consolidate was established as long ago as the reign of Charles II. In *Cummins* v. *Fletcher* (1) there was (*a*) no default in respect of one of the mortgages ; (*b*) it was sought to consolidate a mortgage by A with one by A and B. *Watts* v. *Symes* (2) turned on the construction of the particular deed under consideration. It is settled that the principle applies whether the proceedings are taken by the mortgagor or mortgagee : *Vint* v. *Padgett* (3). That was an action for foreclosure.

But, at all events, on the true construction of the deed of the 9th July, 1874, the matter is made plain : *Mostyn* v. *Lancaster* ; *Taylor* v. *Mostyn* (4). There as here the charge was in the proviso for redemption, which is the appropriate place. See judgment of Fry, L.J., 620, 621. In that case Lord Mostyn, the tenant for life under a settlement created by will, had power to grant mining leases ; and he granted a lease to one James Craig at a peppercorn rent, redeemable on payment of £6000 advanced by Craig to Lord Mostyn, with interest. Subsequently, Strahan and others

(1) 14 Ch. D. 699.
(2) 16 Sim. 640, 647.
(3) 1 Giff. 446 ; 2 De G. & J. 611.
(4) 23 Ch. D. 583.

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advanced to Lord Mostyn sums amounting to nearly £60,000. They took over Craig's mortgage, and the term of years, subject to the equity of redemption in Craig's security. Lord Mostyn's life estate was conveyed to them, and there was a proviso for redemption that, on payment of the amount due on Craig's security, and the amount (£59,000 odd) advanced by Strahan with interest, Strahan, and the trustee for him of Craig's security, would re-assign and re-assure "the said premises hereby mortgaged" to Lord Mostyn. The deed is given *in extenso* at p. 589 of the report. The Court of Appeal (Fry, Baggallay, and Lindley, L.JJ.) held that the entire amount of the conjoint debt was charged on the term of ninety-nine years, and that the second mortgage was a good exercise of the power, or, if defective, would be assisted in equity. Irrespectively altogether of the doctrine of consolidation of mortgages we submit that *Mostyn's Case* (1) is a clear authority that upon the construction of the deed of the 9th July, 1874, the three mortgage debts became charges upon the Newry property as well as upon the agricultural estate.

Jellett, *K.C.*, and *Darley*, for the Church Representative Body:—

The question turns on the deed of the 9th July, 1874. A distinction must be drawn between rights which may be claimed under a deed, and the charge or charges actually created by the instrument on its execution. The bargain of the Church Representative Body was that there was to be no piecemeal redemption, and that if one mortgage was to be redeemed all three should be redeemed. That was an intelligible contract, and that, and that alone, was the contract carried out by the proviso for redemption in the mortgage deed of 9th July, 1874. Two recitals are found in that deed. First, the agreement by the Church Representative Body to lend William Thomson £6000 on the proposed security. Secondly, that the annuitants (Anne Thomson and Alice Thomson) should postpone to it their annuities. But, if the argument on the other side is to prevail, these ladies *quoad* the Newry property postponed their annuities not merely to a charge of £6000, but to

(1) 23 Ch. D. 583.

one of £43,000. In *Mostyn's Case* (1) the judgment of the Court of Appeal delivered by Fry, L.J., was based not on the equity of redemption in the deed there under consideration, but upon the declaration which preceded it: see 23 Ch. D. 620.

April 20.

THE LORD CHANCELLOR:—

This is an interesting question, and we have had the opportunity of considering it overnight. We are not disposed to decide any question upon the doctrine of the consolidation of mortgages. But I do not see any reason why the law should not be applicable in Ireland in the same way as it is applied in England.

We are dealing with a somewhat unusual case. The real question is:—What construction should be placed on the deed of the 9th July, 1874? We have to consider whether the sums of £32,000 and £5000, previously advanced on the security of the mortgage-deeds recited in the deed of July 9th, 1874, were charged by the last-mentioned deed upon the Newry property, together with the sum of £6000, then in the year 1874 advanced by the Representative Church Body to William Thomson. The grant in the deed of 1874 comprised three specified and separate sets of lands and hereditaments, the first-named being those subject under the recited mortgages to the two sums already mentioned, namely, £32,000 and £5000. Two other denominations, being the Newry property, were also the subject of the grant in the deed of 1874, but they were in no way previously, as I understand, subject to the two sums, amounting together to £37,000. The habendum was in these terms—"To have and to hold the said lands and hereditaments, and all other premises hereinbefore expressed to be firstly granted, unto the said Representative Church Body, its successors and assigns, to the use of the Representative Church Body, its successors and assigns for ever, but subject nevertheless to the said recited indenture of mortgage for securing the sum of £32,000 and interest, bearing date the 15th day of April, 1872, and subject also to the said recited indenture of mortgage for securing the sum of £5000 and interest, bearing date the 31st of October, 1872, and also subject to the proviso for

(1) 23 Ch. D. 583.

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redemption hereinafter mentioned; and to have and to hold the said lands and hereditaments, and all other the premises hereinbefore expressed to be hereby secondly and thirdly granted, unto the Representative Church Body, its successors and assigns, to the use of the said Representative Church Body, its successors and assigns for ever, subject to the rents and covenants in the said fee-farm grants respectively contained, and subject to the proviso for redemption hereinafter contained." The habendum was a clear and definite declaration that the three sets of lands and hereditaments, the express subject of the grant in the deed of 1874, should be subject to the proviso for redemption in that deed. Then that proviso, so far as it is relevant, ran as follows:—"Provided, and it is hereby agreed and declared, that if the said William Thomson, his executors, administrators, or assigns, shall on the 4th day of October, 1874, pay unto the Representative Church Body, its successors and assigns, the said sum of £6000, with interest at the rate of £5 10*s.* per cent. per annum, without any deduction except as aforesaid, then the said Representative Church Body, its successors or assigns, shall at any time thereafter upon the request and at the costs of the said William Thomson, his heirs, executors, administrators, or assigns, and upon payment also of said sum of £32,000 and interest so secured as aforesaid by the said indenture of the 15th day of April, 1872, and also of said sum of £5000 and interest so secured as aforesaid by the said indenture of 31st October, 1872, reconvey the said lands, hereditaments, and premises, hereinbefore expressed to be granted and released, unto and to the use of the said William Thomson, his heirs and assigns, or as he or they shall direct." Again, it was further provided that the Representative Church Body should not be compelled to reconvey the said lands and premises firstly, secondly, and thirdly granted in the deed of 1874, or any part thereof, unto William Thomson, or unto any person or persons legally or beneficially interested in them, until the said sums of £32,000 and £5000 so secured as aforesaid by the recited mortgages of April 15th, 1872, and October 31st, 1872, respectively, as well as the said sum of £6000 intended to be secured by the deed, and all interest thereon respectively,

and all costs, charges, and expenses payable in respect thereof, should be fully paid and satisfied.

There can be no doubt as to the true construction and effect of that habendum, the proviso for redemption, and the further express declaration emphasizing and amplifying it. It clearly results from the deed that if Mr. Thomson paid the £6000, and the interest on it, he would have no right to obtain a reconveyance of the lands granted, or any part thereof, until the whole moneys due and the interest had been paid. Without any reference to any question of the law of consolidation, the parties to the deed of 1874 plainly intended and, in my opinion, effectively carried out their intention that the two sums, £32,000 and £5000, as well as the £6000, with the respective interests payable, should be charged upon the Newry property. To prevent any misapprehension, I say nothing to affect or qualify the original indentures of mortgage, the two sums first mentioned.

Mostyn v. *Lancaster* (1) is, in my view, clearly applicable. In the result, the order appealed from must be reversed with the costs here and in the other Court.

HOLMES, L.J.:—

The sole question for our consideration in this case is whether when Ross, J., was ruling the final schedule of incumbrances the two sums of £32,000 and £5000 were charged on these lands, and should have appeared on the schedule. I am disposed to think that Ross, J., was misled by the argument turning on the doctrine of consolidation of mortgages rather than the construction of the deed. The intention of the parties to the deed was that these three sums should be charged on all the property, and, therefore, when ruling the schedule they should have been left to appear on it as so charged. The Representative Church Body may say—We do not want to be paid out of this estate; but the charges cannot be struck out to the prejudice of other persons.

(1) 23 Ch. D. 583.

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CHERRY, L.J.:—

I concur. I agree that the only question to be decided is the net one:—Are the sums of £32,000 and £5000 charged by the deed of 9th July, 1874, on the Newry property? In my opinion, the proviso for redemption contained in that deed, and the clause which immediately follows it, have the effect of charging both of these sums on that property. The schedule of incumbrances as originally prepared is, therefore, quite correct, and ought not to be amended in the manner applied for by the respondents.

Order appealed from reversed (1).

Solicitor for the owner: *T. T. L. Overend.*

Solicitors for the Representative Church Body: *Maunsell, Darley, and Orpen.*

W. G.

(1) On the 17th June, 1912, the case again came before the Court on appeal from an order of Wylie, J., who held that the owner was entitled to the bonus. After an exhaustive investigation of the figures of income and outgoings at the date of the sale, the Court of Appeal held that at that date, which was taken by both sides to be the crucial one (*In re Earl of Bandon's Estate* [1907] 1 I. R. 226), the whole estate, including the Newry property, was insolvent as to income, and the bonus was accordingly ordered to be added to the purchase-money.

ALLMAN *v.* McDANIEL.

M. R.
1912.
June 17, 24.

Vendor and purchaser—Conditions of sale—Distillery—Deduction for expenses of sale.

One of the conditions of sale, on the sale of a distillery, provided that "the purchaser shall, on completion of the purchase, be entitled to such of the said whiskey as may remain unsold, and also to the proceeds of sale, whether paid or unpaid, of such whiskey as shall have been sold after the 31st December, 1910, on payment by the purchaser, or deduction from such proceeds of sale, whether paid or unpaid, of £5 per cent. towards the costs and expenses of sale of such whiskey."

Held, that the £5 per cent. was intended to cover all the costs and expenses for which the purchaser would be liable in connexion with the sale of the whiskey.

Question arising upon a sale of property by the Court in a partnership action. The property consisted of Allman's distillery at Bandon, county Cork, including the distillery premises, machinery, plant, whiskey, goodwill, and debts due to the firm of Allman & Company. It was sold as a going concern in the sense that the business of the sale of whiskey was being carried on, and the distillery was in full working order. The property was sold subject to conditions of sale.

Condition 6 of these conditions was as follows :—

"The purchaser is to pay the sum of £1926 0*s.* 6*d.*, further portion of his purchase-money, to the said Mr. J. Harold Pim, to be lodged to the credit of the cause, and separate credit of the proceeds of the sale of the property, and sum stated to be due to Messrs. Allman, Dowden, & Co., subject to all rights and priorities affecting same (if any), and under a lodgment schedule to pay the balance of his purchase-money (after deducting the amount paid as deposit) into Court to the credit of this cause, on or before the 30th day of June, 1911; and if the same is not so paid, then the purchaser is to pay interest on his purchase-money at the rate of £5 per cent. per annum from the 30th day

M. R. 1912. ALLMAN v. McDANIEL.

of June, 1911, to the day on which the same is actually paid. Upon payment of the purchase-money in manner aforesaid, the purchaser is to be entitled to possession (or to the rents and profits) as from the 31st day of December, 1910, from which day all rents, rates, taxes, and outgoings are to be paid by the purchaser in addition to such outgoings as are included in the items making up the sum of £759 19*s.* 1*d.*, mentioned in the particulars and subject to which the property is sold."

Condition 33 was as follows:—

"The receiver, since the 31st December, 1910, has continued and shall continue to sell the whiskey and collect the debts as heretofore in the ordinary course of business until the completion of the purchase. *The purchaser shall, on completion of the purchase, be entitled to such of the said whiskey as may remain unsold, and also to the proceeds of sale, whether paid or unpaid, of such whiskey as shall have been sold after the* 31*st December*, 1910, *on payment by the purchaser or deduction from such proceeds of sale, whether paid or unpaid, of* £5 *per cent. towards the costs and expenses of sale of such whiskey.* The purchaser shall also be entitled to all money received by the receiver representing debts due to the business or to him on the said 31st December, 1910, after deducting 5 per cent. to cover the costs and expenses of collection. The receiver shall prepare and certify an account of all such sales and collection as aforesaid and the purchaser shall be bound thereby. The purchaser shall at his own expense collect all debts due at the completion of the purchase, which may represent whiskey sold after the said 31st December, 1910. The property will be sold, discharged from all liabilities save and except a sum of £759 19*s.* 1*d.*, in respect of debts due to sundry creditors as mentioned in the said balance sheet as on 31st December, 1910. A list of these debts has been prepared by the receiver, the accuracy of which shall be admitted by the purchaser, and same can be inspected at the offices of the solicitors having carriage at any convenient hour previously to the sale and will also be produced at the sale for such inspection."

The date of the sale was the 14th June, 1911.

It was now contended on behalf of the vendors that, under

the terms of condition 33, the purchasers were liable to pay either the whole of the costs and expenses connected with the sale of the whiskey in addition to the £5 per cent. mentioned in the condition, or else to pay any balance of such costs and expenses not covered by the £5 per cent. The purchasers maintained that they were only liable to pay the £5 per cent.

Pigot, K.C., and *Denning*, for the vendors:—

The £5 per cent. towards the costs and expenses of sale is on the same footing as the £5 per cent. to cover the costs and expenses of collection. They are intended to provide a fund to remunerate the receiver.

The £5 per cent. is only "towards" the costs and expenses of sale. It is not the measure of the whole deduction to be made. The actual costs and expenses in the present case exceeded £5. per cent. We claim that we are entitled to the whole of these expenses apart from the £5 per cent.

Poole, for the purchasers:—

The condition is clear. The £5 per cent. is intended to cover all the costs and expenses. The purchasers are not to be under any further liability. Even assuming that the condition is ambiguous, an ambiguous condition is to be construed as strongly as possible against the vendors.

THE MASTER OF THE ROLLS (1). June 24.

In this case I have to decide a question which has arisen between the vendors and purchasers of the property sold under an order of the Court, dated the 29th day of November, 1910.

The property in question is the concern known as Allman's Distillery, consisting of the distillery premises, the machinery, plant, whiskey, goodwill, and debts due to the firm of Allman & Co. as on the 31st December, 1910, as a going concern.

This property belonged to the partnership firm of Allman & Co., and the sale was carried out for the purpose of winding up the affairs of the partnership, and distributing the proceeds according to the rights of the partners.

(1) The Rt. Hon. C. A. O'CONNOR.

M. R. 1912.

ALLMAN v. MCDANIEL.

The receiver appointed by the Court over the partnership property had the carriage of the sale, and the parties to the action had liberty to bid.

James Abraham Allman and George Allman were the purchasers, and they purchased under conditions of sale on the construction of which the question for decision arises.

In order to arrive at the true construction of the conditions of sale, it is necessary to bear in mind the nature of the property for sale. It was a fully equipped distillery, together with the whiskey on store in its warehouses and the debts due to the concern. The whole was to be sold as a going concern, but only as a going concern in the sense that the business of the sale of whiskey was being carried on and the distillery was in full working order. The manufacture of whiskey had been discontinued pending the sale. This is apparent from the particulars of sale, in which is to be found the statement that "distilling can be started at a few days' notice." The date of the sale was the 14th June, 1911.

Now, if the sale were an open one, the purchasers would have been entitled to get possession of the entire concern as of the day of sale, all outgoings and incomings to be apportioned as of that date. Any departure from such an adjustment should be regulated by conditions.

By the conditions of sale (6th condition) the purchaser was to be entitled upon payment of the purchase-money to possession (or to the rents and profits) as from the 31st December, 1910, from which day all rents, rates, taxes, and outgoings were to be paid by the purchaser in addition to certain outgoings specially named, and to which it is not necesssary to make further reference. The outgoings mentioned in this condition (apart from those specially mentioned) are, as I construe it, only those of the nature of rents, rates, and taxes, and do not cover expenses in connexion with the carrying on of the business, which are dealt with by the 33rd condition. This condition states that the receiver since the 31st December, 1910, has continued and still continues to sell the whiskey and collect as heretofore, &c. [His Lordship read the condition.] This and the 6th condition contain the only provisions which throw upon the purchaser the burden of any expenses or outgoings which arose prior to the actual sale. The

6th condition, as I have said, and I think rightly, only refers to outgoings in the nature of rents, rates, and taxes. The 33rd condition deals with what I might call trade outgoings, and the full extent of the purchaser's liability in respect thereof depends on the scope and extent of this condition.

Two questions arose from this condition—(1) Was the £5 per cent. to be calculated on what is called the "long price" of the whiskey, which includes the duty, or only on the "short price," which excludes the duty? (2) was the £5 per cent. intended to cover all the costs and expenses for which the purchaser was to be liable in connexion with the sale of whiskey?

It has been already decided as against the purchasers that the £5 per cent. should be calculated on the long price; and it was alleged in the course of the argument that the second question has been raised by the purchasers only as an afterthought on being defeated on the first question, and that the purchasers were previously willing to pay the £5 per cent. and also the costs and expenses of sale. Whether this is so or not I do not intend to inquire into, because I see nothing in the nature of an estoppel on the purchasers to prevent them from raising the second question now; nor was the case pushed so far by the vendors' counsel. This question is, in my opinion, still open. As I understand the vendors' case it is that the words "on payment by the purchaser . . . of £5 per cent. towards the costs and expenses" throw on the purchaser the obligation of paying both £5 per cent. and in addition the costs and expenses. But the use of the word "towards" seems inconsistent with such a contention. "Towards" seems rather to indicate a contribution. But then it was contended that if the £5 per cent. was to be a contribution the purchasers are at least liable for the balance of the costs and expenses—in other words, for the whole costs and expenses towards which the £5 per cent. was to go. If this were so, there was no meaning in mentioning the £5 per cent. In that view the only thing which ought to have been expressed was that the purchaser was to pay all the costs and expenses. Why mention £5 per cent. if the purchaser was to pay all the expenses? The purchasers, on the other hand, contend that the £5 per cent. was to be the measure of the costs and expenses which they were to be liable for. This, in my opinion, is the true construction.

M. R. 1912. ALLMAN *v.* MCDANIEL.

It was recognized that as the sales of whiskey were to continue, and as the purchaser was to have the benefit of the sales, he should bear the expense; and the purpose of the condition seems to have been to simplify accounts as between vendor and purchaser, by naming £5 per cent. as the measure of the purchaser's liability. If this was not done, it might have been necessary to make elaborate calculations, apportioning to the sales a certain amount of the whole expenses incurred in keeping open the concern as a going concern. It is to be observed that all the expenses of continuing the business from the 31st December, 1910, up to the date of sale, are not thrown on the purchaser, but only the costs and expenses of sale and costs, and expenses of collection of debts. I have not omitted to consider the argument of vendors' counsel based upon the contrast between the use of the word "towards" in connexion with the costs and expenses of sale, and the word "cover" in connexion with the costs and expenses of collection. It was very properly urged that the difference in language indicated that the £5 per cent. in the first case was to be in part payment, while in the second case it was to be full discharge. My observation on this is, that even though the £5 per cent. in connexion with the sale would only be a part payment, it was nevertheless to be the full liability of the purchasers. As I said before, it requires a special condition to make a purchaser liable for outgoings prior to the date of sale, and his liability must be clearly fixed by such condition.

The conditions of sale are not as clearly expressed as they might have been. Mr. Pigot in his argument admitted that they were ambiguous. If they are so, they must, according to a well-known rule of construction, be interpreted in favour of the purchaser.

My ruling is that the purchasers are only liable for the £5 per cent.

Solicitors for the defendant McDaniel: *Wynne & Wynne.*
Solicitors for the purchasers: *Lane & Co.*

A. E. C.

IN RE SAMUEL MURRAY HUSSEY'S ESTATE (1).

Appeal.
1912.
May 16.

Land Commission—Jurisdiction—Amendment of fiated agreement or vesting order—Inclusion of stranger's land in holding vested in tenant-purchaser—Local Registration of Title Act, 1891, *section* 34, *sub-section* (2)—*Land Law* (*Ireland*) *Act*, 1896, *section* 32, *sub-section* (3).

The decisions of this Court in *In re Wilson's Estate* (42 Ir. L. T R. 122), and *In re Leonard's Estate* (*ante*, p. 215), are applicable to a case where land, claimed by a stranger to the proceedings as his property, has been, by accident, neglect, or oversight, included in the premises vested as the holding in the tenant-purchaser; and therefore, if there be a *bona fide* dispute as to whether the premises so claimed did in truth form part of the holding, the Land Commission have no jurisdiction through the Judicial Commissioner to entertain a motion under section 32, sub-section (3), of the Land Law (Ireland) Act, 1896, to amend the fiated agreement.

APPEAL by the vendor from an order of Wylie, J., dated 16th April, 1912, refusing an application on his behalf that the vesting orders (2) made in the cases of five tenants, Norah Murphy, James Seares, Thomas Kennedy, John Kevans, and Patrick Lynch, should be amended by excluding from the lands so respectively vested in these tenants (who had purchased their holdings under the Land Acts) the mill-stream and 7 feet on either side of the said stream, and that the areas of the holdings as set out in the fiated agreements be reduced accordingly. The stream and 7 feet of land on either side thereof were claimed by Messrs. Latchford and Sons, Millers, under a fee-farm grant, dated 13th December, 1865, from Edward Hussey, predecessor in title of the vendor, to John Latchford, and such claim was admitted by the vendor. The omission to exclude them from the fiated agreements was attributed to mistake, misunderstanding, and oversight. Several affidavits were filed, some on behalf of the vendor in

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) These were really fiated agreements.

Appeal. 1912.

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support of the motion, including one made by a member of the firm of Latchford and Sons, and others by the tenants; but, having regard to the view taken by both Wylie, J., and the Court of Appeal, it is unnecessary for the purpose of this report to set them out in full. They showed, in the opinion of the Court of Appeal, a *bona fide* controversy between the parties on a question of title. The conveyance, which expressly granted the stream and 7 feet on either side to John Latchford and his heirs for ever, was produced in Court. Wylie, J., on the authority of the decision of this Court in *Leonard's Estate* (1), was of opinion that he had no jurisdiction to entertain the application, and accordingly refused it by the order under appeal.

Ronan, K.C. (with him *Macrory* and *The Hon. Cecil T. Atkinson*), for the appellant:—

The learned Judge in the Court below was in error in holding that he had no jurisdiction. He was misled in supposing that *Leonard's Estate* (1), in which this Court reversed his own decision, had any application to the case before him; and, in his natural loyalty to this Court, overlooked the great distinction between conveyances under the Landed Estates Court Act and a vesting order or fiated agreement under the Land Purchase Acts. Under section 61 of the Landed Estates Court Act a conveyance by the Judge of that Court was effectual to vest absolutely and irrevocably in the purchaser from the Court the lands described in the conveyance, although the property of an innocent stranger to the proceedings were by error included in the conveyance. And the Landed Estates Court had no jurisdiction to rectify such error: *In re Tottenham's Estate* (2). In that case, which, it is needless to say, has ever since been followed, and must be accepted as absolute law, the very disaster which has occurred here took place. By mistake a piece of land, the property of an adjoining owner, was conveyed to the purchaser. Judge Lynch thought he had power to rectify the error, and, on motion, directed the purchaser to reconvey this piece of land to the solicitor having carriage as a

(1) *Ante*, pp. 212, 215. (2) I. R. 3 Eq. 528.

trustee (1). The purchaser appealed from this order, and it was reversed by the Court of Appeal in Chancery. The Lord Chancellor (Lord O'Hagan), at p. 537 of the report of the case on appeal, alluding to the judgment of Judge Lynch, whose language was usually marked by extreme moderation and simplicity, said:—"Further, I can sympathize with the feeling which finds expression in impassioned words throughout the judgment we are reviewing—the desire to correct error and prevent injustice, especially when the error and injustice have, to some extent at all events, been induced by the miscarriage of the tribunal which was charged with the duty of ascertaining the correctness of the map as to which the whole controversy has arisen. But, though I entertain these feelings of respect and sympathy, I confess I should feel it very difficult, even if the case were of the first impression, and not already ruled, as I think it has been by the most coercive authority, to hold the order sustainable, or the jurisdiction properly assumed." And His Lordship proceeded to say that he thought all question as to the indefeasibleness of title under a Landed Estates Court conveyance was settled by *Errington* v. *Rorke* (2) and *Power* v. *Reeves* (3), both in the House of Lords, and by *In re Walsh's Estate* (4) in the Court of Appeal in Chancery. And Lord Justice Christian, to take a couple of lines from a long and impressive judgment, said, "The present" (*i.e. Tottenham's*) "case brings out in strong relief the features of what I have ventured to designate as *legalized confiscation*," the italics being His Lordship's. But contrast section 61 of the Landed Estates Court Act, and especially as thus judicially interpreted, with section 8 of the Purchase of Land Act, 1885, as to vesting orders. These orders were to vest "the holding," or the interest of any person in "such holding," in the purchaser, and they were to be binding on all persons claiming any estate or interest in the lands comprised in "the holding"; and "holding" under section 57 of the Land Law (Ireland) Act, 1881, during the continuance of a tenancy, which here

(1) I. R. 2 Eq. 375.
(2) 7 H. L. C. 617.
(3) 10 H. L. C. 645.
(4) I. R. 1 Eq. 399.

Appeal. 1912. *In re* HUSSEY'S ESTATE.

lasted till the vesting orders or fiats were made, means "a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy." All that the Land Commission have power or jurisdiction to vest in a tenant-purchaser is his own "holding," the parcel of land held by him from the vendor, who was his landlord. There is no power to sell the property of anybody else, or to vest such property in the tenant-purchaser. The Land Commission had no legalized power of confiscating the Latchfords' fee-simple property, and vesting it in any other person, whether as tenant of Hussey or otherwise. Nor do they purport to do so. These are cases not of vesting orders properly so called, but of fiated agreements which under the Land Law (Ireland) Act, 1896, section 32 (1), may be substituted for vesting orders, and have a like effect. In each agreement the vendor (landlord) agrees to sell, and the tenant agrees to purchase the tenant's holding. The mere misdescription of acreage, or the non-exclusion on the ordnance map of a stream and 7 feet on each side of it, cannot add the stream and the adjoining strips to each holding, if they are in fact the property of a stranger to the estate and the holdings thereon.

The only reported authority upon the question as to the effect of a mistake in a vesting order is *Quinn* v. *Hewson* (1), where Johnson, J., held that the statement of area in a vesting order and annexed map was not conclusive.

In *In re Leonard's Estate* (2), the amendment which was made by Wylie, J., in the fiated and registered purchase agreement was blotting out a right of way which it reserved to the purchaser of an adjoining holding. In arriving at the conclusion that he was wrong in making such amendment, the basis of the decision of this Court was the Local Registration of Title Act, 1891—that the amendment worked an injury to the purchaser of the adjacent holding within section 34 (2) of that Act. But to thus oust the jurisdiction of the Judicial Commissioner to amend the proposed amendment must inflict injury on some person. Injury cannot mean the inconvenience of defending a person's right in a Court of law. The Latchfords

(1) 26 Ir. L. T. Misc. 534. (2) *Ante*, pp. 212, 215.

are either entitled to the stream and strips of land or they are not. If they are entitled, how can the proposed amendment injure the purchasing tenants? If they are not entitled, the motion will be refused. But can it be said that the Judicial Commissioner has no jurisdiction to determine the question in an expeditious and inexpensive manner; and that, in almost every case of mistake, the party who is deprived of his property, without any fault of his own, by accident or the negligence of some one else, is to be put to bring an action to recover it?

Michael Comyn, for the purchasers was not called on.

THE LORD CHANCELLOR:—

We shall dismiss the appeal without prejudice to the right of the parties in any future proceedings which they may be advised to take. We think that the judgments of this Court in *Wilson's Estate* (1), and in *Leonard's Estate* (2), fully justified the course taken by Mr. Justice Wylie in declining to entertain the application for amendment, having regard to the nature of the questions which arose.

HOLMES, L.J.:—

I concur. I was a party to the decisions in the two former cases, *In re Wilson's Estate* (1), and *In re Leonard's Estate* (2). I then formed the opinion that section 34, sub-section (2), of the Local Registration of Title Act, 1891, taken in connexion with section 32, sub-section (3), of the Land Act of 1896, under which these applications were made, applies only to cases where there is a mistake substantially admitted; and, where there being no real controversy between the parties, no person interested would be injured by the proposed amendment or alteration. In the present case there is a *bona fide* contest between the parties, involving a question of title; and while I agree that whatever constituted the holding, and no more, passes by the fiat, yet there being a dispute as to the extent of the holding, the question is not one to which

(1) 42 Ir. L. T. R. 122. (2) [1912] 1 I. R. 215.

Appeal. 1912. *In re* Hussey's Estate.

the section applies, nor one to be decided by the Judicial Commissioner upon motion, on conflicting affidavits. For these reasons I think Mr. Justice Wylie was right in refusing to entertain it.

Cherry, L.J. :—

I think that Mr. Justice Wylie was perfectly right in holding that this case is governed by the decisions of this Court in *Wilson's Estate* (1) and *Leonard's Estate* (2). What was there determined was, that this sub-section (3) was not applicable to cases in which there were contested rights between tenant-purchasers and third parties. If it were otherwise, an enormous burden would have been thrown on the Judicial Commissioner, who would then have to determine disputes of that class all over the country. The point in dispute here can be tried either in the Chancery or King's Bench Division of the High Court, or possibly in the County Court.

Solicitors for the vendor: *Thomas F. O'Connell & Son.*
Solicitor for the tenant-purchasers: *John O'Connell.*
Solicitors for Latchford and Son: *F. & C. Downing.*

W. G.

(1) 42 Ir. L. T. R. 122.
(2) [1911] 1 I. R. 212, 215.
(3) Sect. 34, sub-sect. 2, of Local Registration of Title Act, 1891.

O'LEARY *v.* LAW INTEGRITY INSURANCE COMPANY, LIMITED.

Barton, J.
1912.
June 13, 26.

(1912. No. 522.)

Practice—Service out of jurisdiction—Defendant resident in England—Insurance policy—Contract made within the jurisdiction—Rules, Supreme Court, Ireland (1905), *Order XI, Rule* 1 (*f*).

The defendants were an Insurance Company, having their registered offices in Liverpool, and carrying on business there. Their agent in Dublin approached the plaintiff in Dublin, who signed a proposal there for a policy, and handed it to the agent with the first weekly premium. The proposal contained a declaration by the plaintiff that the conditions of issue printed on the policy immediately upon the delivery thereof should be read by him, and should alone form the basis of the contract between the company and himself. The policy was executed by the company in Liverpool at their head office, and delivered by their agent to the plaintiff in Dublin. The policy contained conditions as to payment of premiums, days of grace, provisions for revival on lapse, and as to arbitration.

Held, that the contract was made in Dublin, and that the Court had power to give liberty to issue and serve a writ on the defendants out of the jurisdiction in an action to set aside the policy as *ultra vires*, and for repayment of premiums paid thereunder.

MOTION on behalf of the defendant company to discharge an order, dated the 7th June, 1912, giving liberty to issue and serve a writ of summons out of the jurisdiction. The plaintiff was a commercial traveller residing in Dublin. The defendants were an Insurance Company, having their registered offices at 38 Church Street, Liverpool.

The facts were as follows:—

On the 22nd November, 1909, the plaintiff filled up and signed a proposal in Dublin for a policy, and handed it to the

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agent of the company in Dublin, together with 8*s.* 4*d.*, the first weekly premium under the proposed policy. The proposal form was as follows :—

FORM OF PROPOSAL FOR INVESTMENT POLICY.

Division No. .....

District No. ..... Table No. ..... Policy No. .....

Agency, ...

THE LAW INTEGRITY INSURANCE CO., LTD.

Head Office, 38 Church Street, Liverpool.

1. Name in full, ...
(If a lady add Miss or Mrs.)

2. Address in full, ...

3. Occupation, ...

4. Age next birthday, ...

5. Premium, £.... Period of years, ... Amount of Policy, £....

6. Premium payable (weekly or otherwise), ...

7. Are you in a good state of health ? .....

DECLARATION.

I hereby declare that I have carefully read the above answers to questions 1 to 7, and I agree that the conditions of issue printed on every policy immediately upon the delivery shall be read by me, and they shall alone form the basis of the contract between the Company and myself.

Signature of Agent, ... (as witness). Signature of Proposer, ...

Address, ... Date, ...

N. B.—The first premium must be paid when the proposal is signed.

The signed proposal was forwarded by the agent to the head office in Liverpool. The directors in Liverpool thereupon executed a policy to the plaintiff in accordance with the proposal, which

policy was delivered to the plaintiff in Dublin by the agent of the Company. On the policy was indorsed the following printed conditions:—

1. All premiums are due on Monday in each week, when this policy is issued as a weekly one; but in the event of the insured being out of employment, or incapacitated through sickness, and unable to pay the premiums, ten days' grace will be allowed; if not then paid, this policy at once lapses. When this policy is issued as a yearly, half-yearly, or quarterly one, thirty days' grace will be allowed from date when premium is due.

2. In the event of this policy lapsing at any time as per condition (1), same may be revived at any time during the first twelve months from date of lapsing, provided all arrears are paid up, together with 5 per cent. interest. No policy can be revived unless same has been endorsed at chief office, and such endorsement must be signed by the Managing Director.

3. If any dispute or question arise respecting the liability of the company under this policy, or as to the amount to be paid to the insured or his representatives, the matter shall, if required by either party, be referred to arbitration, such arbitration to be conducted by a sole arbitrator if the parties can agree upon one, and failing such agreement the arbitration shall be that of two disinterested persons, one to be chosen by each party in difference, with power for such arbitrators in case of their non-agreement to appoint an umpire in the usual way, and in case either party shall neglect or refuse for the space of fourteen days after request in writing from the other so to do to name an arbitrator, the arbitrator of the other party may proceed alone and the award of such arbitrators, sole arbitrator, or umpire, as the case may be, shall be binding on all parties and this submission and any award thereon may be made a rule of Court, and no action shall be brought or prosecuted on this policy until the liability of the company shall have been so ascertained, and all costs of, and connected with the arbitration, shall be in the discretion of the arbitrators, sole arbitrator, or umpire, who are or is for the purpose of any such arbitration to have all powers exercisable by arbitrators by statute.

On the 7th June the plaintiff applied for and obtained leave to issue and serve a writ out of jurisdiction. The indorsement on the writ claimed:—(1) A declaration that the plaintiff's policy in the defendant company is *ultra vires* the memorandum and articles of association of the defendant company; (2) an order that the defendant company do pay to the plaintiff all sums paid by him to the defendant company by way of premiums with interest thereon from the date of demand; (3) such other order as the Court may be pleased to direct; (4) costs.

Barton, J.
1912.

O'LEARY v. LAW INTEGRITY INSURANCE CO., LTD.

Serjeant Molony, K.C. (with him *S. Moore*), in support of the motion :—

This contract was made in England and the Court has no power to allow service out of the jurisdiction. The policy was executed in Liverpool and the contract was then complete, before delivery to insured: *Xenos* v. *Wickham* (1). In *Roberts* v. *Security Company, Ltd.* (2), it was held that the contract was completed and the policy binding on execution by the company before delivery, even though no premium had been paid. *Muller & Co.'s Margarine, Ltd.* v. *Commissioners of Inland Revenue* (3) is an authority that a contract is made where the signature of the last necessary party to it is affixed.

Dickie, contra :—

The contract is only completed when the policy is delivered to the insured and the conditions read by him, otherwise he would be bound by conditions which he had not assented to or even read. *Hebb's Case* (4) shows that an acceptance is not complete unless made as indicated by the offer ; here the insured indicated that the acceptance would only be complete when he had received and read the policy. Contracts made by post are on an entirely different footing ; there both parties contemplate the post as a common agent. [He further cited *Cox* v. *Troy* (5) and *Chapman* v. *Cottrell* (6) ; Anson on Contracts, 9th ed., p. 28.]

Serjeant Molony, in reply.

June 26. BARTON, J. :—

The only question is, whether the contract was made in Liverpool or in Dublin. The facts, as disclosed by the affidavits and documents, are as follows :—The defendants' Company have their head office in Liverpool ; they have an agent in Dublin.

(1) L. R. 2 H. L. 296.
(2) [1897] 1 Q. B. 111.
(3) [1900] 1 Q. B. 310 ; [1901] A. C. 217.
(4) L. R. 4 Eq. 9.
(5) 5 B. & Ald. 474.
(6) 3 Hurl. & Colt. 865.

The agent approached plaintiff in Dublin, who on 22nd November, 1909, signed in Dublin a proposal for the policy in question, and handed it to the agent, with 8*s.* 4*d.*, the weekly premium. The agent forwarded the proposal to Liverpool. The proposal contained certain answers to queries as to name, address, occupation, age, and health, and contained the following declaration signed by the proposer:—"I hereby declare that I have carefully read the above answers to questions numbered 1 to 7, and I agree that the conditions of issue printed on every policy immediately upon the delivery shall be read by me, and they shall alone form the basis of the contract between the company and myself." The agent forwarded to Liverpool the proposal duly filled up and signed by the proposer. The directors of the company signed and sealed a policy which had on the back thereof certain conditions. The first condition stated that all premiums were due on Monday in each week in the case of a weekly policy, but that ten days' grace would be allowed if the assured shall be out of employment or incapacitated by sickness and unable to pay the premium. If the premium should not then be paid, the policy would at once lapse. The second provided that, in the event of a lapse, the policy might be renewed within twelve months from the lapse on payment of all arrears, together with 5 per cent. interest. The third provided for arbitration in case of dispute. These conditions were of importance to the assured and to the company. This policy was returned to the agent, who delivered it to the assured. Under the circumstances, I think the contract was made in Dublin. The proposal was signed in Dublin, and contemplated delivery, in Dublin, of the policy to the proposer, and that he was then to read the conditions printed on the policy, and to become bound by them as the basis of the contract. The parties contemplated that the policy would not be completely binding on either party until delivery in Dublin. I do not see that this is affected by the fact that the company sealed the policy in Liverpool. Whatever consequences the sealing of the policy might have, it would not make the policy binding on both parties until delivered to the proposer in Dublin. This case is distinguishable from the common cases of contract by correspondence when the post

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office is treated as the agent of the proposer. Here we have a contract made by an agent in Dublin in which the parties stipulated for delivery to the proposer in Dublin of the policy, and communication to the proposer of conditions which were to be the basis of the contract. The contract was then binding on both parties, but not before. Accordingly, I refuse the application.

Solicitor for the defendants: *Michael J. O'Farrell.*
Solicitor for the plaintiff: *Michael J. Dwyer.*

E C F.

IN RE FRANCIS CRUMPE, DECEASED; ORPEN *v.* MORIARTY.

Barton, J.
1912.
June 24.

(1878. No. 184.)

Will—Construction—Conditional gift of annuity—"To cease on return to England"—Forfeiture.

A testator bequeathed an annuity to his nephew C. subject to the condition that "should the said C. return to Ireland, England, or Scotland," the annuity was to cease. C., who resided in New Zealand, took a passage to and landed in England, alleging that he was on his way to Jersey. The facts proved were consistent with his statement, and it was in evidence that the usual way of travelling to Jersey from New Zealand was through England. Shortly after landing in England he committed murder and was convicted in England, but was found to be insane, and was detained in a criminal lunatic asylum.

Held, that C. had forfeited the annuity.

BY his will, dated 1st June, 1874, Francis Crumpe made the following bequest: "I leave and bequeath an annuity of £120 a year, to be paid by £60 half-yearly to my nephew, John Langford Crumpe, to be paid to him only in Australia or any British Colony, where he may desire it to be remitted to him through the Provincial Bank, or any Colonial Bank in London. Let him then put his shoulder to the wheel to some profitable or useful purpose. Having lived there some years, he ought to know what to do; and should the said John Langford Crumpe return to Ireland, England, or Scotland, I then revoke this annuity for the said John Langford Crumpe, and he has my leave to die in the poor-house. And should this annuity at any time be revoked from the said John L. Crumpe, I then divide this annuity into two equal parts, one-half to be given as Sustentation Fund to the Irish Disestablished Tralee Church, and the second portion to be given to the officiating clergyman, in or of Tralee Church, and by him to be doled out to the poor on every Christmas Day, according to his discretion, during the life of the said John L. Crumpe. On his decease then it reverts to my personal property."

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MORIARTY.

After the death of the testator the annuity was paid to the said John L. Crumpe, till 1907. In the spring of 1907, John L. Crumpe, who had resided in New Zealand from the death of the testator, landed in England, and on 22nd May, 1907, he murdered Mary Crumpe in England, and at the Winchester Summer Assizes, 1907, he was found guilty of murder, but insane, and was ordered to be detained in a criminal lunatic asylum during His Majesty's pleasure. In a subsequent letter written by John L. Crumpe, he alleged that he was on his way to Jersey when he committed the murder. The facts were consistent with this statement; and it was in evidence that the usual way from New Zealand to Jersey was through England.

An application was now made by the Rev. W. M. Foley, the Rector of Tralee Church, for a declaration that the annuity to John L. Crumpe had been forfeited, and for the payment out of Court of the annuity to the annuitants in remainder, from the return of the said John L. Crumpe.

Hon. Cecil Atkinson, for the applicant:—

This case is not covered by authority. The annuitant has come within the terms of the forfeiture clause; he has returned to England. That return was voluntary, notwithstanding that his subsequent stay may have been against his will. The motive of return is immaterial: *Adams* v. *Adams* (1), *Arbib and Class's Contract* (2). The testator's object was to keep him out of the country; he directed the annuity to be paid only in a colony.

John H. Russell, for the Bishop of Limerick.

H. MacDermot, for the Attorney-General.

Hewitt R. Poole, for John L. Crumpe:—

The object of the condition was to ensure that the annuitant should reside abroad and earn his living there, and this has been done. The annuitant was merely passing through England on his way to Jersey. He had scarcely landed when he was prevented

(1) [1892] 1 Ch. 369. (2) [1891] 1 Ch. 601.

by his arrest from continuing his journey. In *Arbib and Class's Contract* (1) the Court expressly guards itself from holding that a mere temporary stay is within the term "return." Lindley, L.J., at p. 613, says, "I do not say that if he merely came . . . on shore for half an hour that would be sufficient to comply with the condition." What happened after his arrest is immaterial. It is laid down by Lord Campbell, C., in *Clavering* v. *Ellison* (2), that a state of facts caused by duress cannot work a forfeiture. Would arrest on board ship and subsequent detention in England work a forfeiture? Surely not.

Hon. C. Atkinson, in reply.

BARTON, J.:—

The forfeiture and gift over were to take effect if the annuitant should return to Ireland, England, or Scotland; and the testator directed that the annuity should be paid only in Australia, or some other British Colony. It is clear that the testator did not wish the annuitant to return to these islands; and that he had expressed the intention that the annuity should cease upon his doing so. The case is therefore quite unlike *Arbib and Class's Contract* (1), where the testator contemplated a person being his executor and trustee when he should return to England; nor is it like *Clavering* v. *Ellison* (2), where the condition was not sufficiently plain. It appears that the annuitant returned to England, and murdered a person who had some interest in this estate. At his trial, the jury returned a verdict of guilty, but found that he was insane at the time of committing the crime; and he remains in detention during His Majesty's pleasure. I do not see how these circumstances help the annuitant or contravene the fact of his return. There has been, in my opinion, a return within the meaning of the will; and I feel no difficulty in holding that the forfeiture and consequent gift over have taken place.

Solicitor for Rev. W. M. Foley: *McGillicuddy & Morphy.*
Solicitor for the Bishop of Limerick: *W. J. Shannon.*
Solicitor for the Attorney-General: *Lewis F. Smith.*
Solicitor for John L. Crumpe: *W. C. Molony.*

E. C. F.

(1) [1891] 1 Ch. 601. (2) 7 H. L. Cas. 707.

Ross, J.
1912.

July 8, 9, 24.

IN THE MATTER OF THE ESTATE OF SIR CHARLES NUGENT.

Land Purchase Acts—Incumbered estate—Vendor—Bonus—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48, *sub-s.* 1—*Vendor not entitled to receive any part of the rents and profits—Large arrears of interest on incumbrance.*

At the date of the sale of an estate to the tenants under the Irish Land Acts a receiver, who had been appointed at the request of incumbrancers by a former owner then in possession but now deceased, continued in receipt of the rents and profits. The receiver's account showed an annual balance of £70 after payment of all outgoings and interest on incumbrances, but there was a large arrear of interest due on a mortgage, six years of which would take forty-eight years' purchase of the surplus to wipe out.

Held, that the estate came within the definition in the proviso in s. 48, sub-s. 1, of the Irish Land Act, 1903, and that the bonus should be added to the purchase-money.

In re Bandon's Estate [1907] 1 I. R. 226, distinguished.

QUESTION arising in the ruling of the final schedule of incumbrances, as to whether the bonus should be paid to the vendor or should be added to the purchase-money?

The estate for sale in the matter was subject to numerous incumbrances on the fee-simple, and on the life estate of the vendor. By deed dated in 1902 Philip O'Reilly was, at the instance of the incumbrancers, appointed receiver over the estate by the then tenant for life of the estate, James O'Reilly Nugent, since deceased. The agreements for sale in the matter were dated March, 1908. At that date the said Philip O'Reilly was the person in receipt of the rents of the lands sold.

The rental and outgoings of the estate as on 25th March, 1908, were certified by the receiver to be as follows:—

Total rental, ...			£2208 17 11
Income tax and rates, ..	£125 11 10		
Quit-rents, ...	27 8 3		
Rentcharge, ...	57 18 2		
Donation, ...	1 0 0		
Head-rent, ...	8 15 5		
Drainage charges, ...	9 6 7		
Land improvement charge, ..	3 18 8		
Bailiffs, ...	12 0 0		
Account costs, ...	5 12 2		
Receiver's fees, ...	110 8 10		
			361 19 11
			£1846 18 0
Interest on incumbrances, ..			1776 1 2
Balance, ..			£70 16 10

At the date of sale a large arrear of interest, amounting to a sum of £6509 3*s.* 9*d.*, was owing to the English and Scottish Life Assurance Association, on foot of a mortgage of 16th June, 1871.

Assuming that only six years' arrears of interest were recoverable, the amount of arrears recoverable would amount to £3420, which, on a surplus of £70 16*s.* 10*d.*, would require about forty-eight years to discharge. By deed dated 5th September, 1910, the vendor assigned to Robert Blood and A. R. O'Conor all sums of money to which he might be or become entitled by reason of the sales to tenants then pending, or which might be added to the purchase-money to arise from such sales by way of percentage or bonus on the purchase-moneys thereof under the Irish Land Acts. The said assignees applied for an order directing payment of the bonus to them. The English and Scottish Law Life Assurance Association contended that the estate was insolvent as to income

Ross, J. 1912.

In re NUGENT'S ESTATE

at the time of sale—and that the bonus should be added to the purchase-money.

G. W. Walker, *K.C.* (with him, *Macrory*), for the applicants, the assignees of the bonus:—

The estate was solvent as to income at the date of sale. The bonus is therefore payable to the vendor. *In re Bandon's Estate* (1) decides that the rental must be put on one side, and the outgoings on the other side; and if there is a balance in favour of the owner, section 48 (1) does not apply, and the bonus is payable to the vendor. That case is binding, and is not overruled by *In re Cramer Robert's Estate* (2). The receivership deed in *Bandon's Estate* (1) was in full force; here the receivership deed lapsed by the death of the person who appointed the receiver: *Markwick* v. *Hardingham* (3), where it was held that receivership ceases on the assignment to the assignee in bankruptcy.

Only six years' arrears of interest can be claimed by the Insurance Company: *In re Blennerhassett's Estate* (4). The section contemplates a comparison of the income and the outgoings at a particular date, the date of sale. In *In re Thomson's Estate* (5) the Court of Appeal followed *In re Bandon's Estate* (1).

W. M. Jellett, *K.C.*, and *Meldon*, for the vendor and the remaindermen.

S. L. Brown, *K.C.*, and *Chadwick*, for the English and Scottish Life Assurance Association, were not called upon.

Ross, J.:—

It is alleged that if I decide against the applicants, my decision will be inconsistent with the decision of Wylie, J., in *Bandon's Estate* (1). If I find a case like *Bandon's Estate* (1) in its essentials, I will follow that decision.

(1) [1907] 1 I. R. 226.
(2) [1908] 1 I. R. 222.
(3) 15 Ch. D. 339.
(4) [1911] 1 I. R. 16.
(5) *Ante*, p. 466, note (1).

Section 48 (1) of the Act of 1903 provides that "when an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof, the percentage shall be added to the purchase-money, and shall not be paid to the vendor."

In *Ely's Estate* (1) I held that the mere fact that the vendor, who was tenant for life of a solvent estate, was temporarily dispossessed by an English receiver, was not sufficient to compel me to hold that he should not receive the bonus.

I understood that Wylie, J., took the same view in *Bandon's Estate* (2), which was a more extreme case; there he found that although it would have taken a considerable number of years for the arrears of interest to be paid off, yet, following the same principle, the vendor could not be said to be out of receipt of the rents and profits.

But in the present case, on the figures as presented to me, I have arrived at the conclusion that there is an overwhelming arrear of interest on the mortgages, and that the rents and profits of the lands would not be sufficient to pay off that arrear within any reasonable time. On the last day when this case was at hearing I asked Mr. Walker did his contention go this length, that, in a case where it would take a thousand years to pay off arrears of interest due on foot of incumbrances, but where the income in one year exceeded the outgoings, the principle of *Bandon's Estate* (2) should be applied, and the vendor be held to be constructively in possession of the rents and profits? He answered, "Yes."

I refuse to yield to that contention. To do so would be plainly contrary to the express words of the Act of Parliament. Here the arrears are so large and the estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents and profits within any reasonable time. I do not think he would be entitled to receive any portion of the rents at any time.

(1) [1904] 1 I. R. 66; [1905 1 I. R. 413.

(2) [1907] 1 I. R. 226.

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That being so, the law says that the bonus is to be added to the purchase-money, and I so decide.

Solicitors for the applicants: *A. O'Connor & Son.*
Solicitors for the English and Scottish Life Assurance Association: *Longfield, Kelly, & Armstrong.*
Solicitors for the vendor: *Meldon & Co.*

D. M. S.

IN THE MATTER OF THE ESTATE OF WILLIAM DALY AND DENIS ST. GEORGE DALY (1).

Appeal.
1912.
July 30.

Lands repurchased by owner under section 3 of the Irish Land Act, 1903—*Holding—Annuity—Subdivision—Apportionment—59 & 60 Vict. c. 47, sect. 38, sub-sect.* (3)—*3 Edw. 7, c. 37, ss. 1, 3.*

Where demesne or other lands are resold to an owner by the Irish Land Commission under section 3 of the Irish Land Act, 1903, the Irish Land Commission may, if they think fit, authorize the subdivision of the lands, and apportion the annuity payable in respect thereof, under sect. 38 (3) of the Land Law (Ireland) Act, 1896.

APPEAL by Denis St. G. Daly, Julia Catherine Anne Daly, John Kinneen, and Henry J. Synnott, from an order of Mr. Justice Wylie, dated the 25th June, 1912, and made on the hearing of a question submitted to him under section 28 (8) of the Purchase of Land (Ireland) Act, 1891.

The question of law was stated as follows:—1. By the effect of an indenture dated the 29th July, 1882, and made between the Right Hon. Denis St. George, Baron Dunsandle and Clanconal, of the one part, and William Daly, late of Dunsandle, in the county of Galway, and Robert W. Meade (both since deceased) of the other part, and several subsequent deeds, the said William Daly and Denis St. G. Daly of Over Norton Park, in the county of Oxford, were, at the respective dates of the institution of the matters in the title mentioned, entitled in possession as tenants for their respective lives, in equal undivided moieties, to freehold estates of large extent and value in the county of Galway, and elsewhere in Ireland.

2. The said William Daly and Denis St. George Daly in exercise of the powers of sale vested in them by the Settled Land Acts, 1882 to 1890, and in pursuance of section 6 of the Irish Land Act, 1903, sold portions of the said estates in the

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

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county of Galway to the Irish Land Commission in the said matters, and in pursuance of section 3 of the same Act repurchased 2055 acres statute measure, or thereabouts, of demesne and other untenanted lands, portion of the said estates, obtaining advances amounting in the aggregate to the sum of £26,899 for that purpose.

3. By vesting orders of the Irish Land Commission, dated respectively the 1st February, 1906, and the 19th July, 1906, the lands repurchased as aforesaid were vested in the said William Daly and Denis St. George Daly, their heirs and assigns, in fee-simple as tenants in common in equal shares, subject as to the lands comprised in the first-mentioned vesting order to an annuity of £649 3*s.* 2*d.*, payable to the Irish Land Commission, as in the Irish Land Act, 1903, provided, from the 1st February, 1906, to secure an advance of £19,974, and as to the lands comprised in the said secondly mentioned vesting order, to an annuity of £225 1*s.* 4*d.*, payable to the Irish Land Commission, as in the Irish Land Act, 1903, provided, from the 19th July, 1906, to secure an advance of £6925, the said two sums of £19,974 and £6925 making together the said sum of £26,899.

4. The said William Daly died on the 27th December, 1910, having made his will dated the 27th March, 1907, whereby he devised his share of the lands repurchased by him and the said Denis St. G. Daly as aforesaid, to Julia Catherine Anne Daly, John Kinneen, and Henry J. Synnott, upon trust for his younger sons, William Cecil Daly and James Henry Daly, in equal shares, and gave the said trustees powers of sale and management of the said lands.

5. The said will was on the 9th February, 1911, proved in the District Registry at Tuam by the said Julia Catherine Anne Daly, John Kinneen, and Henry J. Synnott, the executors therein named. The said William Cecil Daly and James Henry Daly are infants under the age of twenty-one years.

6. The said Denis St. George Daly and the said Julia Catherine Anne Daly, John Kinneen, and Henry J. Synnott, propose to sell the lands so repurchased as aforesaid in lots, and desire for that purpose that the said purchase annuities of £649 3*s.* 2*d.* and £225 1*s.* 4*d.* should be legally apportioned.

The opinion of the Judicial Commissioner is therefore requested on the question following:—Whether the Irish Land Commission has power to apportion the Land Purchase annuity payable in respect of demesne or other land resold to an owner by the Irish Land Commission under section 3 of the Irish Land Act, 1903?

The following was the curial portion of the order of Mr. Justice Wylie, now the subject of appeal:—"The Court, having regard to the decision of Mr. Justice Madden in *In re Freeman* (1), that lands repurchased by an owner under section 3 of the Irish Land Act, 1903, do not constitute a holding, and being therefore of opinion that the provisions of section 38 (3) of the Land Law (Ireland) Act, 1896, do not apply, doth answer the said question of law in the negative."

The Irish Land Commission was not represented before the Judicial Commission, or on the hearing of the appeal.

M. G. Longfield, for the appellants:—

The purchase of demesne or other lands by the Land Commission, with a view to resale to the owner, was introduced for the first time by section 3 of the Irish Land Act, 1903, and therefore the sub-division of such lands, and the apportionment of the annuity payable in respect thereof, were not in the contemplation of the Legislature in framing section 38 of the Land Law (Ireland) Act, 1896; but it is submitted that the entire machinery of the Land Purchase Code—the valuation of the lands, the vesting of the lands subject to the purchase annuity, and the resultant liability of the purchaser to pay the annuity and the power of the Land Commission to enforce its payment—was imported by section 3 (1) of the Act of 1903, in respect of the lands thereby dealt with, and that the powers of the Land Commission, under the 38th section of the Act of 1896, to authorize sub-division and to apportion the annuity, must therefore be applicable to such lands. To hold otherwise would be contrary to public policy, as lands repurchased under section 3 of the Act of 1903, and subject to large annuities, might be

(1) [1907] 1 I. R. 444.

Appeal. 1912. *In re* DALY'S ESTATE.

unsaleable if the annuities could not be apportioned; and it would be strange if the remedies against a purchaser of demesne were more restricted than they would be as against an ordinary tenant-purchaser in default.

It is true that in *In re Freeman* (1) Madden, J., held that section 54 of the Act of 1903, containing restrictions on the creation of incumbrances on holdings subject to the repayment of advances to the Irish Land Commission, did not apply to lands repurchased under section 3 of that Act; but the Court was then dealing solely with the question of incumbrances, and not those of sub-division and apportionment. That demesne lands and lands in the vendor's own possession do not form, strictly speaking, a "holding," does not dispose of the appellants' contention. The word "holding" in section 38 (3) of the Act of 1896, as applied to lands which have been discharged of any contract of tenancy, must be given a wider definition than that contained in section 57 of the Land Law (Ireland) Act, 1881, and since the passing of the Irish Land Act, 1903, the term may be extended so as to include the new subject-matter of sale and repurchase referred to by section 3 of that Act, in respect of which no contract of tenancy ever existed. Further, the Land Commission is a statutory corporation, certain of whose functions are of a purely administrative character: *In re Creagh Hickie's Estate* (2); and as they are not merely agents for the collection of the annuity, but also the owners of an estate or interest in the annuity, separate from the estate of the owner of the lands (*In Re Parkinson* (3)), there is, as one of the incidents of such ownership, the right, if they deem proper, to apportion the annuity, apart from the provisions of section 38 of the Act of 1896.

THE LORD CHANCELLOR:—

I think that the word "holding" in section 38 (3) of the Act of 1896, as applied to lands already vested in purchasing tenants, was used to identify the particular lands over which at that time

(1) [1907] 1 I. R. 444.
(2) 26 I. L. T. R. 145.
(3) [1898] 1 I. R. 390.

the Land Commission had jurisdiction, namely, lands held prior to the purchase under a tenancy from a landlord. A new class of land has, however, been brought within the purview of the Land Purchase Acts since the Act of 1903, and lands not held by tenants have, under section 3 of that Act, been made the subject of a sale to the Land Commission and a repurchase by the vendor. After full consideration, I think, in the absence of any provision in the Act that the vendor so repurchasing and his successors should, as it were, be anchored to the lands until the payment of the advance, it is only a matter of common sense to hold that such lands should be within the power of having the annuity charged upon them apportioned under the conditions applicable to the ordinary holding purchased under the Land Code. The meaning of the section must be that the vendor who has repurchased under section 3 of the Act of 1903 is to be in the same position as a tenant who has purchased lands formerly held under a tenancy, but no longer so held once the purchase was completed. I agree with Mr. Longfield that section 38 (3) of the Act of 1896 must have the same substantial application in the case of a sale and repurchase of demesne lands under section 3 as in the case of a sale of an ordinary holding, the tenant of which thereby becomes the owner. Accordingly, the Land Commission may, if they think fit, authorize an apportionment of the annuity in the one case as in the other.

HOLMES and CHERRY, L.JJ., concurred.

Solicitors for the appellants: *Richardson & Synnott.*

R. ST. J. C.

M. R.
1912.

July 20.
Oct. 29.

In re DUBLIN CORPORATION and BAKER; Ex parte THOMPSON.

(1912. No. 856.)

Lands Clauses Acts—Compulsory purchase—Lessee's interest—Arrears of rent—Payment out of Court.

A lessor cannot claim arrears of rent out of money lodged in Court under the Lands Clauses Acts as compensation for the interest of the lessee. *Ex parte Carey, In re Great Southern & Western Railway Company*, [1847] 10 L. T. (O. S.) 37, followed.

Originating Summons.

This was an application by the plaintiff, Andrew Thompson, who claimed to be a mortgagee on the estate of the defendant, Patrick Baker, for an order (1) that the sum of £99 7*s.* 2*d.* be declared well charged upon the lessee's interest in the house and premises known as 79 Cook Street, in the City of Dublin, under and by virtue of the equitable deposit of the lease of the said house with the plaintiff, or in the alternative on the sum of £45 awarded in respect of the said lessee's interest in the said premises; (2) for payment out of Court to the plaintiff of the said sum of £45 standing to the credit in the title mentioned in the books of the Accountant-General; (3) for the costs of and incidental to the action and proceedings thereunder.

The facts of the case were as follows:—

The house 79 Cook Street was acquired by the Dublin Corporation, as the Urban Sanitary Authority under the Dublin (Cook Street Area) Improvement Order, 1910, as confirmed by the Order of the Local Government Board for Ireland, dated January 19th, 1911.

The plaintiff, Andrew Thompson, carried on business as a money-lender, under the name of Mary Power. In the year 1906 the defendant, Patrick Baker, deposited with the plaintiff, by way

of equitable mortgage, as security for amounts due or to become due to him, an indenture of lease dated September 8th, 1905, and made between Louisa Diana Cecilia Martyn and others, as lessors of the one part, and the defendant as lessee of the other part, which lease comprised the premises now known as 79 Cook Street, and was for a term of sixty years, from December 1st, 1905, at the yearly rent of £5, payable half-yearly on June 1st and December 1st in each year.

The arbitrator, by his award, dated 25th July, 1911, awarded £45 to Patrick Baker, lessee, and Mary Power, mortgagee, for their interest in the said premises. The lessors were also awarded compensation for their interest.

Title was furnished by the solicitors for the defendant, and requisitions made by the solicitor for the Corporation, who required the solicitors for the defendant to make provision for the release of the equitable deposit. The parties failed to agree as to the amount due, the plaintiff alleging that £99 7s. 2*d.* was due, the defendant that only £4 was due.

The solicitors for the Corporation in February, 1912, gave notice to the parties that unless they came to an agreement the Corporation would lodge the £45 in Court under the Lands Clauses Acts, and oppose any application for costs; and as the parties failed to agree, the money was lodged in Court on June 11th, 1912.

On June 26th, 1912, this summons was taken out by the plaintiff, and came on for hearing on July 20th.

The solicitor for the trustees of the will of H. V. Jackson, in whom the lessors' interest had become vested, having become aware of the plaintiff's application, instructed counsel to appear at the hearing, and claim to be paid £21 2*s.* out of the money in Court, for arrears of rent due to them by the defendant, Baker. It appeared that they had obtained judgment in ejectment for non-payment of rent, and on March 4th, 1911, had taken out a writ of possession, but had not put it in the hands of the sheriff, because the arbitration proceedings were pending, and that there was £16 2*s.* due for rent at the date of the arbitrator's award, being £16 10*s.*, three years' rent and arrears to June 1st, 1911, less 8*s.* paid on June 14th, 1911, and £5, one year's rent, accrued since, making in all £21 2*s.*

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In re DUBLIN CORPORATION AND BAKER; Ex parte THOMPSON.

Overend, for the plaintiff:—

The plaintiff is entitled to the £45 in Court, as the amount of his equitable mortgage exceeds that amount. The landlord of the premises is not entitled to a charge on the money in Court for arrears of rent due by the tenant: *Ex parte Carey*; *In re Great Southern and Western Railway* (1), cited in 1 Hudson on Compensation, p. 664, note to section 119 of Lands Clauses Act, 1845. *Ex parte Carey* was cited in *In re Kilworth Rifle Range* (2), but the Court declined to express any opinion whether arrears of rent were or were not a charge or incumbrance on the sum of money allowed by the arbitrator in respect of the interest of the lessees or tenants, holding, in answer to the question of the arbitrator, that he was not entitled to take into account the arrears of rent in assessing the value of the reversion.

Moonan, for the defendant, Patrick Baker.

[He merely disputed the amount of the plaintiff's claim.]

Philip White, for the Dublin Corporation:—

The Corporation should not be ordered to pay costs, as the money was only lodged in Court because of the dispute between the parties: *Re English* (3).

Bartley, for the lessors:—

The landlord is entitled to rent up to the date of the lodgment of the money in Court, June 11th, 1912. There was £16 2*s*. due for rent at the date of the arbitration proceedings, and £5 accrued since, or £21 2*s*. in all. In *Callow* v. *Flynn* (4) it was held that a lessor was entitled to recover from his tenant rent under the lease for the period between the date of the award and the lodgment in Court of the compensation in respect of the tenant's interest. If this had been an ordinary sale of the lessee's interest, the lessors would have been entitled to be paid the arrears of rent out of the purchase-money. In *Ex parte Carey* (1) part of the land was taken; here the whole was taken.

(1) 10 L. T. (O. S.) 37.
(2) [1899] 2 Ir. R. 305.
(3) 13 W. R. 932.
(4) 26 L. R. Ir. 179.

Overend, in reply :—

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In *In re War Secretary and Hurley's Contract* (1) it was held, following *Ball* v. *Graves* (2), which was discussed and distinguished in *Callow* v. *Flynn* (3), that where part of a tenant's lands were taken and the rent apportioned, the apportioned rent ran from the date when the apportionment was made. The proceedings here are not under the Railways Acts, but under the Housing of Working Classes Acts, which incorporate certain provisions of the Lands Clauses Acts.

THE MASTER OF THE ROLLS :—

Oct. 29.

In this case a sum of £45 was lodged by the Dublin Corporation under the Lands Clauses Acts in respect of the leasehold interest of Patrick Baker in premises known as No. 79 Cook Street, which were compulsorily acquired by the Corporation as Sanitary Authority. Mr. Andrew Thompson, an equitable mortgagee upon the leasehold interest for a sum considerably more than £45, applies to have the whole amount paid out to him in part satisfaction of his claim, while the trustees of the will of the late H. V. Jackson, who were the owners of the reversion expectant on the said leasehold, assert a prior claim on the fund to the extent of £16 2*s*., being an arrear of rent due to them as landlord of the premises at the date of the arbitrator's award. The reversion expectant on the lease, as well as the leasehold estate, was acquired by the Corporation, so that the relation of landlord and tenant as between the trustees of Jackson and their former tenant, Patrick Baker, has determined.

Counsel for the trustees contended that as the money in Court represented the leasehold interest, and as that interest could have been ejected for non-payment of rent, and in that way taken in satisfaction of the rent, the trustees have now a kind of charge or lien upon the money. It is difficult, however, to see how such a case can be successfully made. A lessor's right of ejectment depends upon his estate in reversion, but the trustees have parted

(1) [1904] 1 Ir. R. 354.
(2) 18 L. R. Ir. 224.
(3) 26 L. R. Ir. 179.

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with their estate, and so have lost all rights incident to it. There is now only one estate in the lands, viz., an estate in fee, which is vested in the Dublin Corporation. In principle, therefore, I cannot hold that the trustees have any rights as against the money in Court. They have a personal right of action against the lessee, but this does not give any specific claim against the fund.

A similar claim was made against a fund in Court in *Ex parte Carey* (1), but it was disallowed, and, so far, the case is an authority against the claim made by the lessors in the present case. There is no other authority in point, the Court of King's Bench having in *In re Kilworth Rifle Range* (2) expressly declined to give any opinion on the question whether arrears of rent were or were not a charge upon the money awarded in that matter in respect of the lessee's interest. Being satisfied that much more than the full amount is due to Mr. Andrew Thompson, I will order that the sum of £45 be paid to him.

I make no order as to costs.

Solicitor for the plaintiff: *Cecil G. Thompson.*
Solicitors for the defendant: *J. J. Walsh & Son.*
Solicitors for the lessors: *G. A. Kennedy.*
Solicitor for Dublin Corporation: *Ignatius J. Rice.*

W. L.

(1) 10 L. T. (O. S.) 37. (2) [1899] 2 I. R. 305.

IN THE MATTER OF THE ESTATE OF DONOUGH O'BRIEN.

Wylie, J.
1912.
June 3, 10.

Settlement—Lands sold under Land Purchase Acts subject to settled annuity —Deficient security—Arrears exceeding amount of available funds— Apportionment of loss as between tenant for life and remaindermen.

Lands sold under the Land Purchase Acts were subject to a perpetual annuity payable to a widow for life, with remainder to her children. The deed by which the annuity was secured gave power to the trustees, in case of non-payment, to recover arrears by distress or receipt of the rents and profits of the lands. It also contained a covenant by the grantor with the trustees for payment of the annuity. Since she became entitled the widow had received the entire net rents and profits of the lands, but this net income had always been insufficient to pay the annuity in full. At the time of sale the amount due for arrears of the annuity exceeded £3000. The net amount of purchase-money available for payment of these arrears and the redemption price of the annuity was less than £1000. On a question arising as to how this sum should be applied :—

Held (1), that the proper way of apportioning the loss arising from insufficiency of income of the lands, as between tenant for life and remaindermen, was to declare the widow entitled only to such diminished annuity as the net available income was sufficient to pay; and (2), As regards the loss that occurred in consequence of the sale (*a*), as to the period prior to the sale (exceeding one year) during which it appeared that the widow had received no income, that the proper mode of adjusting the loss was that provided by s. 24. sub-s. 8, of the Irish Land Act, 1903, viz. : to pay to her out of the purchase-money a sum equivalent to one year's rent, less by the amount of any outgoings unpaid at the date of sale; and (*b*) as to the period subsequent to the sale, that the loss should be adjusted on the principle adopted in *Cox* v. *Cox* (L. R. 8 Eq. 343), viz., to ascertain what principal sum, if invested at the date of sale at 4 per cent. interest, would, with such interest added down to the date of payment, amount to the entire sum available to meet the annuity and arrears, and that the interest so added would belong to the widow, and the principal sum so ascertained would supply the future income for the widow and her children in lieu of the annuity.

QUESTIONS of law arising on allocation.

The facts as stated in the judgment of Wylie, J., were as follows :—

By an indentare dated the 8th September, 1873, Denis O'Brien

Wylie, J. 1912.

In re O'Brien's Estate.

in fulfilment of a covenant in his marriage settlement, being seised in fee of the lands sold in this matter, conveyed the same to William O'Connell, his heirs and assigns, subject to a life interest in the said Denis O'Brien and to a limited power of charging the fee thereby reserved to him, to the use of Cornelius O'Brien and John O'Brien, their heirs and assigns, to receive and take out of the rents, issues, and profits of the said lands a yearly rentcharge of £150, to be charged on the said lands, and to be paid and payable to the said trustees, their heirs, and assigns after the decease of the said Denis O'Brien for ever, with power to the trustees or trustee for the time being, in case of non-payment, to distrain and to enter into possession of the said lands, and the rents and profits thereof, to receive, take, and apply until the said annuity or rentcharge and all arrears thereof should be fully paid. And the said Denis O'Brien thereby covenanted with the trustees, that he, his heirs, executors, administrators, or assigns would for ever pay unto the trustees the said annuity or yearly sum of £150. The said indenture then declared that the trustees should stand seised of the said rentcharge upon trust, in case Elizabeth O'Brien, his wife, should survive him, the said Denis O'Brien, to pay unto or permit and suffer the said Elizabeth O'Brien and her assigns to receive the said rentcharge during her life, and, after her decease, then upon trust to convey the said rentcharge of £150 to their children, according to appointment, and, in default of appointment, to the children equally as tenants in common in fee, and, in case of no children attaining a vested interest, upon trust to convey the said rentcharge of £150 and premises unto the heirs and assigns of the said Denis O'Brien. The said Denis O'Brien died on the 24th day of June, 1879. His widow, Elizabeth O'Brien, and some children were still alive. From the 24th day of June, 1879, until the date of sale in this matter, Elizabeth O'Brien had received yearly the entire net rents and profits of the lands, after payment of the outgoings prior to the rentcharge, but during the entire period this net income had been insufficient to pay the rentcharge in full. It was stated that the arrears of rentcharge due to Elizabeth O'Brien exceeded £3000, while the entire purchase-money, including bonus, available for payment of

these arrears and the redemption price of the rentcharge, was less than £1000. The question that now arose was, how was this money so available to be applied?

H. Webb, for the vendor.

T. S. M'Cann, K.C., for the trustee :—

The loss arising from the deficient security should be borne proportionately by those entitled in possession and reversion. As stated by James, V.-C., in *Cox* v. *Cox* (1) :—"The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other . . . The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund." See also *Turner* v. *Newport* (2); *Innes* v. *Mitchell* (3). There are two ways in which this principle can be applied here, either by treating the entire available sum as capital and paying only the interest on it to Mrs. O'Brien, or by apportioning it in some way between the arrears and the redemption value of the annuity. If the latter course is adopted, one method of carrying out the apportionment would be that applied in *In re Atkinson* (4) and in *Stewart* v. *Kingsale* (5), viz., to divide the available sum in the proportion which the amount of arrears bears to the amount of the redemption value of the annuity. In *In re Metcalf* (6) there was an express power, if the income was insufficient, to raise the annuities by mortgage, and Farwell, J., held that this provision showed an intention to prefer the annuitants in possession over those in reversion. There is no such express power here.

Hewitt Poole, for Mrs. O'Brien :—

The entire available sum should be paid to Mrs. O'Brien, who is entitled in possession for her life to the annuity, on foot of the large arrears due to her. She would have been entitled to raise

(1) L. R. 8 Eq. 43.
(2) 2 Ph. 14.
(3) 1 Ph. 710.
(4) [1904] 2 Ch. 160.
(5) [1902] 1 I. R. 496.
(6) [1903] 2 Ch. 424.

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the arrears by a sale of the lands in the Chancery Division. If she had adopted this course, the security would ultimately have been swept away.

June 10.

Wylie, J. :—

[After stating the facts as above set out, his Lordship continued.] There are three modes suggested of applying the available money; (1) that it should all be applied in discharge *pro tanto* of the arrears; (2) that it should all be considered as capital, and the interest only paid to the widow; or (3) that it should be apportioned in some way between the arrears and the redemption value of the rentcharge.

Counsel have not been able to refer me to any authority that covers this case, nor have I been able to find any, but I have been referred to some cases, and there are many others, in which the Courts have laid down and applied the principles which should regulate the rights of tenants for life and remaindermen in respect of property which is insufficient to give them that which the settlement purported to give them.

In *Cox* v. *Cox* (1) an obligor covenanted by his marriage settlement to pay three months after his decease a sum of £6000 to trustees upon trust for a tenant for life and remainderman with interest from the date of his death until payment. Several years after his death assets were recovered which were insufficient to fulfil this covenant. The question was, how was that deficient fund to be applied as between tenant for life and remainderman? James, V.-C., in his judgment says (2): "The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund"; and, accordingly, held that a calculation must be made back of what principal sum at 4 per cent. interest from the date of the obligor's death would amount, with such

(1) L. R. 8 Eq. 343. (2) *Id.*, at p. 344.

interest, to the sum recovered, and the difference paid to the tenant for life for arrears, and then the income on such principal sum would be paid to the tenant for life and remainderman.

Now if, in that case, the smaller principal sum had been paid to the trustees at the death of the obligor instead of some years afterwards as the only sum available for the fulfilment of his covenant, there would have been no question of arrears due to the tenant for life, and he would simply have received the income from this smaller sum during his life, the remainderman taking such income or principal afterwards. In other words, the obligor having covenanted to provide an annual income arising from the investment of £6000 for A, for life, and after A's death for B absolutely, only provided, in fulfilment of his covenant, an income arising from the investment of £4000, and the tenant for life was held only entitled, as against the remainderman, to the income of £4000.

Looking at the case in that light it seems to me to be analogous to the present case. Here Denis O'Brien, by the deed of 1873, covenanted for payment to trustees after his death of a rentcharge or annuity of £150, upon trust for his widow for life, and afterwards for his children in fee, and, to secure payment thereof, granted to the trustees a rentcharge of £150 issuing out of and charged upon the lands sold in this matter. At Denis O'Brien's death, his personal covenant was of no value, and the lands were insufficient to pay the rentcharge in full. What, then, were the rights of the tenant for life of the rentcharge? Was she entitled to receive only such a rentcharge as the lands were sufficient to pay, or was she entitled to such a rentcharge and also to accumulate against the fee the difference between it and the rentcharge of £150, and to raise such arrears by a sale of a sufficient part of the lands, and thereby in time perhaps exhaust the security for the payment of the rentcharge, so that nothing would remain for the children? The latter alternative would be a manifest injustice to the children, entirely opposed to the principles laid down in *Cox* v. *Cox* (1), and, I think, plainly contrary to the intention of the parties to the deed. In case of

(1) L. R. 8 Eq. 343.

Wylie, J. 1912. *In re* O'Brien's Estate.

non-payment, the deed gives no express power to the trustees to recover arrears by a sale or mortgage of the lands, but only by distress or receipt of the rents and profits, and, therefore, this takes the case out of the authority of *In re Metcalfe* (1), where Farwell, J., held that such an express power showed an intention to prefer the annuitants in possession to those in remainder. There is no evidence in this deed of such intended preferment. On the contrary, the rentcharge was created pursuant to a marriage settlement as a provision for the widow and children after the death of the settlor, and the deed shows that the same rentcharge that was to be received by the widow was, at her death, to be conveyed to the children, and, in case of no children, to the heirs of the settlor.

There is no doubt upon the authorities that the owner of a rentcharge, even in the absence of an express power, is, subject to the discretion of the Court, entitled, as against the owner of the lands, to have a sale of a sufficient portion of the lands for payment of arrears. But it seems to me that, in such a case as this, where the land is insufficient to pay the rentcharge, and no power of sale or mortgage is given by the deed for the recovery of arrears, a Court of Equity, on the principles laid down in *Cox* v. *Cox* (2), would not permit the tenant for life of the rentcharge to sell the land for payment of arrears as against the remainderman.

It appears to me, therefore, that the proper way of apportioning the loss in this case, arising from the insufficiency of the income of the lands, between the tenant for life and the remaindermen, is to declare Elizabeth O'Brien entitled only to such diminished rentcharge as the net available income was sufficient to pay. She appears to have acted on the assumption that she was only so entitled since she came into possession of the rentcharge in 1879, because she received yearly, throughout the whole period of nearly thirty years, the net income on foot of her rentcharge, and never sought to recover or raise any arrears out of the fee. If I am right in this method of apportioning the loss from insufficiency of income, it follows that so long as Elizabeth O'Brien received that income no arrears accrued.

(1) [1903] 2 Ch. 429. (2) L. R. 8 Eq. 343.

But a fresh loss occurred in consequence of the sale of the lands under the Land Purchase Acts, and this loss, it seems to me, will require a different mode of adjustment. It would appear from the schedule of tenancies that more than a year's rent was due at the gale day prior to the sale, and, if this was not paid, Elizabeth O'Brien probably received nothing for that year, and may have received nothing since; and if so, she would be entitled to a claim for arrears of income during that period.

For the period prior to the sale during which she received no income, I think the proper mode of adjusting the loss would be that provided by section 24, sub-section (8), of the Act of 1903, viz., to take out of the purchase-money the amount of one year's rent, less the amount of any outgoings unpaid at that date, and to give that to Elizabeth O'Brien in respect of that period. She was clearly the person, within the meaning of the sub-section, who was entitled to receive that net income for her own use.

The adjustment of loss for the subsequent period is a little more difficult. As stated by the Master of the Rolls in *Stewart* v. *Kingsale* (1), the authorities on the subject are in a somewhat confused state. But the Master of the Rolls referred to and considered them all very fully, and I am satisfied, without referring to them again in detail, to adopt the conclusions at which he arrived.

In the first place, the loss is to be apportioned as from the date at which it occurred, *i.e.*, in this case the date of sale. There is to be no going back upon past payments properly made to the tenant for life prior to that date; and, subject to this limitation, the apportionment is to be made according to the value of the interests at the time of the apportionment in respect of income and capital.

Now, applying these principles, there seem to me to be two methods in which the apportionment may be made. The first method would be that adopted in *Cox* v. *Cox* (2), viz., to ascertain what principal sum, if invested at the date of sale at 4 per cent. interest, would, with such interest added down to date of payment, amount to the entire sum now available to meet the rentcharge

(1) [1902] 1 I. R. 496.

(2) L. R. 8 Eq. 343.

Wylie, J. 1912.

In re O'Brien's Estate.

and arrears? The interest so added would belong to the tenant for life, and the principal sum so ascertained would supply the future income of the tenant for life and remaindermen, in lieu of the rentcharge. The second method would be that adopted in *Stewart* v. *Kingsale* (1), and other cases there referred to, viz., to ascertain the amount of the arrears of income that would have been payable to the tenant for life since the date of sale, if the sale had not taken place; to ascertain also the redemption value of the rentcharge, or annual income previously payable, at the same date; then to apportion the entire money now available for both rentcharge and arrears in proportion to the amounts so ascertained for arrears and redemption value respectively. The amount apportioned to arrears would belong to the tenant for life, and the balance would be principal money.

I have worked out both methods on assumed figures, and the results of both are substantially the same. But I prefer the first method for two reasons—(*a*) because it plainly carries out what I think was the intention of the parties to the deed, that the tenant for life during this period should receive the same income as she and the remaindermen would receive afterwards; and (*b*) because it eliminates the difficulty of ascertaining the redemption value of the rentcharge.

If Elizabeth O'Brien has, since the date of sale, received any income from the funds, all sums so received must be added to and deemed part of the present available funds, and must be given credit for as against the arrears of interest at 4 per cent. above mentioned, or as against the amount apportioned for arrears, if the second method were adopted.

Solicitors for all parties: *O'Keeffe & Lynch.*

J. E. W.

(1) [1902] I. R. 496.

IN RE ENEVER'S TRUSTS: POWER *v.* POWER.

Ross, J.
1912.
Nov. 5, 14.

Power of appointment—Excessive exercise—Invalidity of ultimate appointment to an object of the power.

The donee of a power of appointment among her three children appointed the property to a person not an object of the power for life, and after his decease to other persons not objects of the power, and in case none of the said persons should live to take the property, then she gave the same to an object of the power. Two of the persons who were not objects of the power, but in whose favour the testatrix purported to make an appointment, survived the testatrix.

Held, that the ultimate limitation to an object of the power, being dependent on the former void appointments, failed.

ORIGINATING SUMMONS.

By indenture dated 4th June, 1872, made between William Power of the first part, Cleopatra Power, his wife, of the second part, and Joseph Burgoyne of the third part (being a deed made and entered into upon the occasion of the separation of Cleopatra Power from her then husband), after reciting that there were three children issue of the marriage between the said Cleopatra and William Power, named Susan Power, Frederick Power, and John Power, it was agreed and declared that all the estate real and personal which during the joint lives of the said William and Cleopatra Power should descend to or devolve upon or be given, devised, bequeathed, or assigned to or in trust for her, should remain to the sole and separate use of the said Cleopatra Power, absolutely during her life, free from the debts or control of the said William Power, and from and after the decease of the said Cleopatra Power, should go and remain, and be in trust for all such one or more of the said children, as the said Cleopatra Power should by her will or any codicil thereto direct or appoint; and the said William Power should do all things necessary to settle such estate upon the trusts aforesaid.

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Certain property became subsequently vested in the said Cleopatra Power, portion of which was now represented by £362 consols.

The said Cleopatra Power was subsequently divorced from William Power, and lived with one Samuel Bennett, by whom she had one child named James Samuel Bennett, who attained the age of twenty-one years. After the death of the said Samuel Bennett, the said Cleopatra Power married Augustus Joseph Enever, but there was no issue of the said marriage.

The said Cleopatra Enever duly executed her last will, dated 24th December, 1883, stated to have been made in pursuance of the powers vested in her by said indenture, dated 4th June, 1872, and of all other powers. Testatrix gave and bequeathed to her son commonly known as James Samuel Bennett, who then lived with her and her said husband, the income of the property to which she was entitled to her separate use, for and during the term of his natural life, and from and after his decease testatrix gave the said property unto her husband, the said Augustus Joseph Enever, upon trust for all and everyone of her children by him in equal shares and proportions, and in case there should be no such child then testatrix gave and bequeathed the said property to her said husband absolutely, and in case neither her said son nor her said other children, nor her said husband, should live to take the said property, then testatrix gave the same unto her child by the said William Power, named John; and in case of the death of the said child John, then she gave the said property to other children by the said William Power, named Susan Amelia and Frederick Joseph; and testatrix appointed her said husband sole executor and, in case of his death, she appointed Thomas Godwin executor thereof.

Cleopatra Enever died on 6th February, 1911, without having altered or revoked her said will. Her husband, Augustus J. Enever, died on 14th February, 1911. Susan Power died in 1884, intestate and unmarried.

John Power brought the present summons for the determination of the questions arising on the said indenture and will.

S. Hayes, for the plaintiff:—

Where a donee of a power executes the power in favour of persons not objects of the power for life, with remainder to an object of the power, there is an acceleration to the object of the power by striking out the void limitations for life: *Crozier* v. *Crozier* (1); followed in *Craven* v. *Brady* (2). Accretions accruing during the time intervening between the date of the testator's death and the time of vesting must be added to the capital: *Long* v. *Ovenden* (3). A void limitation shall not defeat a limitation over to an object of the power: *Crompe* v. *Barrow* (4).

Oulton, K.C., for the personal representative of Susan Power:—

If the gifts for life are void as not being to objects of the power, the gifts made to objects of the power and depending on the previous invalid life estates do not take effect: *Routledge* v. *Dorril* (5); *Williamson* v. *Farwell* (6); *Reid* v. *Reid* (7). The event never happened on the happening of which alone John was to take.

H. Jones, for James Samuel Bennett.

Ross, J.:— Nov. 14.

By an indenture of 4th June, 1872, which was a deed executed on the occasion of a separation between William Power and his wife, Cleopatra Power, it was declared that all property acquired during the joint lives of the husband and wife should be enjoyed by the wife for life, and that on her death it should go among the children of the marriage as she should by her will appoint. There were three children of the marriage, Susan Amelia, who died in 1884, intestate and unmarried; Frederick Joseph Power; and John Power. Certain property came to Cleopatra Power, which is to be disposed of under the terms of the deed of 1872.

(1) 3 Dr. & W. 353.
(2) L. R. 4 Eq. 209.
(3) 16 Ch. D. 691.
(4) 4 Ves. 681.
(5) 2 Ves. Jun. 356.
(6) 34 Ch. D. 128.
(7) 25 B. 469.

Ross, J.
1912.
POWER
v.
POWER.

The said Cleopatra Power was subsequently divorced from the said William Power, and lived with a man called Samuel Bennett, by whom she had one child, James Samuel Bennett. She afterwards married Augustus Enever. She made her will on 24th December, 1883, and bequeathed the property in dispute to her son, James Samuel Bennett, for life, and after his death she bequeathed it to her husband, Augustus Enever, in trust for the children of the marriage with him, and in case there should be no children, which event happened, she bequeathed it to her husband absolutely. In case neither her said son nor her said other children, nor her said husband should live to take the said property, then the testatrix gave the same to John Power, one of her children by her first marriage, with remainders over.

The testatrix died in February, 1911, and her husband died shortly after. A number of the questions before me admit of an easy answer. Did James Samuel Bennett take anything? Certainly he took nothing. He is not an object of the power. Who is entitled to the rents and dividends due at the death of testatrix? Her personal representative. Did Augustus Joseph Enever take any, and what, estate? He took nothing whatever, not being an object of the power.

There remains the question—Did John C. Power take the estate under the appointment, or does it go to him, to Frederick Joseph Power, and to the representative of Susan Amelia, as if unappointed.

When an appointor exercises his power partly in favour of objects of the power, and partly in favour of those who are not objects of the power, there are cases in which the law holds good so much of the appointment as confers the benefits on objects of the power. Everything turns on the intention of the appointor. In *Crozier* v. *Crozier* (1) the testator appointed to his wife for life, who was not an object of the power, and then to his eldest son, who was an object of the power. Lord St. Leonards held that the appointment in favour of the eldest son was good, but that the rents and profits during the lifetime of the mother passed as in default of appointment.

(1) 3 Dr. & W. 353.

On the other hand, where there are appointments in favour of persons not objects of the power, with an ultimate limitation in favour of somebody who is an object of the power, and this last limitation is dependent on the former void appointments, such last limitation must fail. There is no means of ascertaining the appointor's intention, or rather, to give effect to the last limitation would be to defeat the appointor's expressed intention.

Take the present case. There is, first of all, a life interest given to James Samuel Bennett. Secondly, after his death, there is a trust to Augustus Enever for the benefit of his family; and thirdly, there is a trust for Augustus Enever himself, in the event of there being no children. All these are void. Lastly, there is an appointment in favour of John, an object of the power. It is plain that the last appointment is dependent on those going before, and that when they fail it must fail with them. I must, therefore, answer the last question by declaring that the estate and all the rents and profits accruing since the death of Cleopatra Enever go as in default of appointment equally between Frederick Joseph and John Power, and the personal representative of Susan Amelia Power.

Solicitors for the plaintiff: *Hayes & Son.*
Solicitor for William Power: *Charles F. Mathews.*
Solicitor for James Samuel Bennett: *William J. Lundy.*

D. M. S.

Wylie, J.
1912.
Oct. 29, 30.
Nov. 5.

IN THE MATTER OF THE ESTATE OF MARY JANE DAVIS.

Settlement—Rectification—Legal interests in settled realty—Omission of words of inheritance—No evidence of intention dehors *the deed—Settled lands sold under the Land Purchase Acts.*

By marriage settlement, executed in 1843, reciting (*inter alia*) that the intended husband had agreed to make a suitable provision for the issue of the marriage, and that he was to receive with his intended wife a marriage portion, certain lands, held under lease for ever, were (with others held for estates *pur autre vie*) conveyed to trustees and the survivor of them and the heirs of the survivor upon trust to permit the principal settlor to receive the rents and profits of the portion of the said lands conveyed by him for his life, then to permit the husband to receive the rents and profits of the whole for his life, then, subject to a jointure for the wife in case she survived, upon trust to permit the issue male, if any, of the intended marriage to receive the rents and profits in such shares as the husband, or the wife in case she survived him, should appoint, and, in default of appointment, to permit the first and every other son and sons of the husband to receive the rents and profits in tail male according to seniority, and, in default of issue male, upon trust to permit the issue female, if any, of the intended marriage to receive the rents and profits in such shares as the husband, or the wife in case she survived him, should appoint, and, in default of appointment, *to permit the issue female, if any, to receive the rents and profits as tenants in common and not as joint-tenants*, and, in default of all such issue, then upon trust to permit the right heirs of the husband to receive the rents and profits for ever.

There was only one child issue of the marriage, a daughter, who duly entered into possession under the settlement, and subsequently sold the said lands under the Land Purchase Acts. On a question arising as to the nature of the interest taken by the vendor:—

Held, that, from the provisions of the settlement, it was clearly the intention of the parties that, in default of appointment, the issue female should take estates in fee-simple, and that the settlement should be treated as rectified accordingly, and the residue of the purchase-money paid out to the vendor.

Fitzgerald v. *Fitzgerald* ([1902] 1 I. R. 477), and *Ex parte Rice* (30 I. L. T. R. 57), considered and applied.

Wylie, J.
1912.
In re DAVIS'S ESTATE.

MOTION by the vendor for an order declaring that the vendor was absolutely entitled to the residue of the purchase-money of the lands sold in this matter, and, if necessary for the purpose of such declaration, that the settlement of the 14th day of November, 1843, executed on the marriage of James Tate and Mary Anne Warren, might be reformed or rectified by the introduction of the words "and their heirs" or "and the heirs of their bodies" immediately after the words "issue female, if any, of the said intended marriage," in every place in which such last-mentioned words occurred, or otherwise in such manner, or by the introduction of such prefatory words in the Order to be made on this application, as to the Court should seem just; and that the sum of £411 12*s.* 3*d.* standing to the credit of the estate, or the residue thereof after discharging all just claims, might be paid out to the vendor.

Questions had been submitted by the Examiner as to the nature of the interests taken by the persons deriving under the limitations in the said settlement.

At the date of the settlement, the lands, which had been sold in this matter under the Land Purchase Acts, were held by Robert James under a lease for ever, except a small portion thereof then held by James Tate under a sub-lease for ever from Robert James at a nominal rent.

The parties to the settlement were Robert James, an uncle of James Tate, of the first part, the said James Tate of the second part, Mary Anne Warren of the third part, and trustees of the fourth part. It recited *inter alia* that James Tate had agreed to make a suitable provision for his intended wife and the issue of said marriage, and that Robert James had agreed to convey these lands in order to enable that provision to be made; and further, that James Tate was to receive with his intended wife a marriage portion of £400. And by the said settlement the said lands were (with others then held by Robert James under lease for lives renewable for ever) conveyed by Robert James and James Tate to the trustees and the survivor, and the heirs of the survivor, to hold (subject as in the said lease for ever), upon trust to permit and suffer Robert James and his assigns to receive the rents and profits of that part of the said lands so

Wylie, J. 1912.

In re Davis's Estate.

conveyed by him, during his life, and, after his decease, upon trust to permit and suffer James Tate to receive the rents and profits of the whole of the said lands during his life, and, after his decease, upon trust, subject to a jointure for Mary Anne Warren in case she survived James Tate, to permit and suffer the issue male, if any, of the said intended marriage to receive the rents and profits in such shares and proportions and in such manner as James Tate, or Mary Anne Warren in case she survived him, should by deed or will appoint, and, in default of appointment, upon trust to permit and suffer the first and every other son and sons of James Tate to have, hold, and receive the rents and profits in tail male, according to their seniority of age and priority of birth, and, in default of issue male of the said intended marriage, then upon trust to permit and suffer the issue female, if any, of the said marriage to have, hold, and receive the rents and profits in such shares and proportions and in such manner as James Tate, or Mary Anne Warren in case she survived him, should appoint, and, in default of appointment, upon trust to permit and suffer the issue female, if any, of the said intended marriage to have, hold, and receive the rents and profits as tenants in common and not as joint-tenants, and, in default of all such issue, then upon trust to permit and suffer the right heirs of James Tate to have, hold, and receive the rents and profits for ever.

The events that had happened since the date of the settlement were as follows :—The marriage was duly solemnized. There was only one child of the marriage, Mary Jane Tate, now Davis, the vendor. Robert James, the principal settlor, died in 1846. James Tate survived his wife, married again, and had a son John Tate. James Tate died in 1887, having made a will whereby he purported to devise the said lands, after the vendor's death, to his said son John Tate. No appointment was ever made under the settlement. On the death of James Tate in 1887, the vendor entered into receipt of the rents and profits of the lands, and had since continued in such receipt. It further appeared that the vendor, being doubtful whether she took under the settlement an estate tail or an estate in fee, had in 1887 executed and duly enrolled a disentailing assurance.

The following questions had been submitted:—(1) Whether John Tate, the eldest son of James Tate, took the estate upon his father's death as tenant in tail under the settlement? (2) What estate did the vendor, Mary Jane Davis, take in the said lands as the only issue female of the marriage?

When the matter first came before the Court, the latter question was submitted as one of construction. Wylie, J., then intimated that, in his view, the estates taken by the beneficiaries were legal and not equitable, and that, such being the case, the limitation to the issue female could not, as a matter of construction, give more than life estates, but that the vendor might, if so advised, raise the question of rectification, by a notice of motion in due form for a declaration of right, and payment out of the residue of the purchase-money. The present notice of motion was accordingly served.

Gerald FitzGibbon, K.C. (with him *A. C. Newett*), for the vendor:—

It was clearly the intention of the parties to the settlement that the issue female of the marriage should benefit in default of issue male. In the case of equitable interests, where there is a clear intention to pass the property absolutely, technical words of inheritance are not necessary to pass the fee-simple: *Rodgers* v. *Houston* (1); *In re Tringham's Trusts* (2); *In re Oliver's Settlement* (3). The same evidence of intention that will pass an equitable fee will be sufficient to justify rectification in the case of legal interests. Here the interests are legal, and the settlement should be rectified so as to carry out the clearly expressed intention of the parties. The intention may be gathered from the following points:—(*a*) it is a marriage settlement, the presumed intention of which is to provide for the issue of the marriage: *Champ* v. *Champ* (4); (*b*) the recital that the husband had agreed to make a suitable provision for the issue of the marriage; (*c*) the fact that, as part consideration of the settlement, the husband received a marriage portion with his wife; (*d*) the fact that life

(1) [1909] 1 I. R. 319.
(2) [1904] 2 Ch. 487.
(3) [1905] 1 Ch. 191.
(4) 30 L. R. Ir. 72.

Wylie, J. 1912. *In re* DAVIS'S ESTATE.

estates and estates tail, where intended to be given, are limited in express terms; (*e*) the fact that the powers to appoint among the issue male and the issue female are large enough to include the entire fee; (*f*) the limitation, in default of appointment, to the issue female as tenants in common and not as joint-tenants, showing that such issue female were intended to take more than life estates; (*g*) the ultimate limitation over "in default of all such issue," under which the property was intended to go over *in globo*. In *Fitzgerald* v. *Fitzgerald* (1), where legal estates were limited in a marriage settlement, the deed was rectified on similar evidence of intention as is to be found here. In *In re Bird's Trusts* (2), and in *Ex parte Rice* (3), the Court gathered the intention that the donee was to take a fee-simple in the settled lands from the fact that other property which the donee would take absolutely was settled along with the settled lands. Here lands held for estates *pur autre vie* were also settled, and, on the clear evidence of intention that can be gathered from the deed, would, as a matter of construction, pass to the issue female absolutely.

Serjeant Matheson, K.C., and *R. H. Macrory*, for John Tate:—

In order to rectify a deed, it is necessary to show not only that there is a mistake, but also what that mistake is. Here it is impossible to say whether estates tail in the issue female or estates in fee-simple were intended to be given. In *Fitzgerald* v. *Fitzgerald* (1) it was possible, from the frame of the deed, to gather an intention as to the exact limitations that should be supplied. There is no such clear intention to be gathered from the terms of the settlement here. To hold that the issue female took only life estates, in default of appointment, would not be inconsistent with the intention that, under the ultimate limitation, the property was to go over *in globo*, as, in the event of there being more daughters than one, on the death of each, either there would be a resulting trust to the settlor until the death of the last surviving daughter, or it would be possible to imply cross-remainders for life among the

(1) [1902] 1 I. R. 477.
(2) 3 Ch. D. 264.
(3) 30 I. L. T. R. 57.

daughters. The words preceding the ultimate limitation—"in default of all such issue"—mean on failure of all issue taking under the previous limitations. They are proper words for limiting a remainder, and should be construed simply as "with remainder to." In *Champ* v. *Champ* (1) there was no doubt as to the nature of the omission to be supplied in the limitations. The limitation to the issue was omitted, and the gift over was in case both husband and wife should die without having any children who should attain twenty-one—a contingency that did not occur. In *Ex parte Rice* (2) the Court read the deed as rectified in the light of marriage articles. *Chism* v. *Lipsett* (3), where it was held that the sons and daughters took only life estates, shows that there must be a clear intention, even in the case of estates *pur autre vie*. In *In re Thursby's Settlement* (4), where they were dealing with equitable interests, Farwell, L.J., referring to his decision in *In re Oliver's Settlement* (5), said (6):—"I desire to say that I have never decided, and do not think, that an appointment of equitable interests in land to A., or to a class, without words of limitation, or under the Conveyancing Act, can carry more than a life interest to the appointee. It is not absolutely necessary to have technical words, as in the case of legal estates in land; but there must be circumstances such as Joyce, J., found in *In re Tringham's Trusts* (7), and I found in *In re Oliver's Settlement* (5), sufficient to show an intention that the fee should pass. I can find nothing of the sort here."

Even if we were dealing here with equitable estates, on the evidence of intention that can be gathered from the deed, it would be going further than the Courts have ever gone to construe the limitations to the issue female, in default of appointment, as passing an equitable fee. The fact that the deed purports to give estates tail to the issue male in express terms negatives an intention to give similar estates to the issue female.

(1) 30 L. R. Ir. 72.
(2) 30 I. L. T. R. 57.
(3) [1905] 1 I. R. 60.
(4) [1910] 2 Ch. 181.
(5) [1905] 1 Ch. 191.
(6) [1910] 2 Ch., at p. 188.
(7) [1904] 2 Ch. 487.

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A. C. Newett, in reply:—

If it were held that the issue female took only life estates, it would either be necessary to imply cross-remainders for life among the daughters until the death of the last survivor, which would in effect be making them joint-tenants contrary to the express terms of the deed, or it would be necessary to hold that there was a resulting trust to the settlor on the death of each daughter, which would leave a hiatus until the whole could go to the right heirs of James Tate. We submit that there is sufficient indication of intention in the deed to pass the fee to the issue female; and, as the estates are legal, rectification is the proper course.

Nov. 5.

WYLIE, J.:—

Questions were submitted to me by the Examiner in this case as to the nature of the interests taken by the persons deriving under the limitations in the settlement of the 14th day of November, 1843. [His Lordship referred to the provisions of the settlement, and subsequent events, as above set out, and continued]—The first question put to me was—Whether John Tate, the eldest son of James Tate, took the estate upon his father's death as tenant-in-tail under the settlement? In other words, did the limitation, in default of appointment to the "issue male, if any, of *the said intended marriage*," to the "first and every other son and sons of James Tate . . . in tail male," include a son by a second marriage? The limitation over is in these terms—"and in default of issue male of *the said intended marriage* then upon trust to permit and suffer the issue female, if any, of the said marriage . . .," and the object of the settlement, as declared in the recital, was to make provision for the issue of *said marriage*. Therefore, it seems to me it would be inconsistent entirely with the object of the settlement, which was made not only in consideration of the marriage, but of the marriage portion of the wife, and also with the provisions which precede and follow the limitation to the first and other sons, to hold that the son of the second marriage was included in that limitation.

The second question submitted was—What estate did the vendor, Mary Jane Davis, take in the said lands as the only issue female of the marriage? This was the main question in the case. It was submitted to me as a question of construction; and, when the case was first before me, it was argued as such, though Mr. Newett for the vendor did, I think, suggest that, if I were against him on the question of construction, I might rectify the settlement. Having fully considered the case as a question of construction, I gave a short formal judgment intimating that, in my view, the estates taken by the beneficiaries were legal and not equitable, and that, such being the case, the limitation to the issue female could not, as a matter of construction, give more than life estates; but being informed by counsel for both parties that no evidence as to the intention of the parties could be obtained other than that furnished by the settlement itself, I intimated to Mr. Newett that he might, if so advised, raise the question of rectification by a notice of motion in due form for a declaration of right and payment out of the residue of the purchase-money. Accordingly, the case is now before me on a notice of motion by the vendor for an order declaring that the vendor is absolutely entitled to the residue of the purchase-money, and if necessary for the insertion of appropriate words in the settlement or in the order for payment, and for payment out of the money.

For the law applicable to the case I need only refer to two or three of the authorities cited. In *Fitzgerald* v. *Fitzgerald* (1), by a marriage settlement, executed in 1859, lands belonging to a sister of the husband were, subject to her life estate, limited to the husband for life, with remainder, in default of appointment, if only one child of the marriage to such child *in tail*, and if more than one to all the children who should attain twenty-one as tenants in common in tail. The estates limited were legal, and there was no evidence to show the intention of the parties, except what appeared on the face of the settlement. The Court of Appeal, unanimously affirming the Master of the Rolls, held that the deed itself clearly showed an intention to give an estate tail, though,

(1) [1902] 1 I. R. 477.

Wylie, J. 1912. *In re* Davis's Estate.

as a matter of construction, it only gave a life estate, and that it should be rectified accordingly.

In *Ex parte Rice* (1), by a post-nuptial settlement made pursuant to articles, freeholds and leaseholds were conveyed to trustees, upon trust for the husband and wife successively for life and, after their deaths, for the children of the marriage in equal shares. The question was, whether the children took estates for life or in fee? The Master of the Rolls in giving judgment says—"There are no words of limitation to define the estates to be taken by the children. The estates, it is true, are equitable, but words of limitation are just as necessary in the limitation of equitable estates as in the case of estates at common law. The children, therefore, on the construction of the settlement, only took life estates in the freeholds. But it is an entirely different question whether I cannot now deal with the settlement as if it had been properly drawn?" and, having satisfied himself that the deed showed an intention to give the fee, he declared that the applicant, who was a child of the marriage, was absolutely entitled to the fund in Court which represented the freeholds.

In *Champ* v. *Champ* (2), where, by a marriage settlement of 1829, an estate in quasi-fee was conveyed to a trustee for the husband for life, then for the wife for life, and, in case both should die without leaving any children who should attain twenty-one, for the settlor, his heirs, and assigns—there being no express trust for the children—the Court, being satisfied from the terms of the deed itself that the children were intended to take, supplied the omission.

From these cases and others referred to, and discussed therein, I take it to be now well established that if, in a marriage settlement, a limitation to the issue of the marriage fails by reason of the absence of apt technical words to pass, as a matter of construction, to such issue, the estate which the deed itself clearly shows such issue were intended to take, the Court will rectify the deed so as to make it effective to pass the estate intended

(1) 30 I. L. T. R. 57. (2) 30 L. R. Ir. 72.

to be given and that it is immaterial whether the limitations are legal or equitable. The question, therefore, which I have to decide is reduced to this—What estate does this settlement show the issue female were intended to take by the limitation to them in default of appointment?

Now, what is the evidence of intention furnished by this deed? First, you have the fact, so strongly relied upon in all the cases, that this is a marriage settlement, the main object of which is to provide for the issue of the marriage. Secondly, you have the express recital that the husband had agreed to make a suitable provision for his wife and the issue of the marriage, and that Robert James, the husband's uncle, had agreed to convey the lands in order to enable that provision to be made. Then there is the recital that the husband was to receive with his intended wife a marriage portion of £400. I think this is an important fact in the case, because it seems to me that no reasonable man could suppose that the contract for the settlement of these lands upon the issue of the marriage, in consideration of the marriage and of £400 paid by the wife, was not intended to comprise the fee-simple of the lands. The conclusion, therefore, that I would draw from the recitals alone in this marriage settlement would be that the entire fee was intended to be settled upon the issue of the marriage.

Now is this conclusion displaced or confirmed by the limitations in the settlement? There is first a limitation to the settlor for life, and then to the husband for life, so that when a life estate is given it is so expressed. Then, subject to a jointure for the wife, there is a power to appoint to the issue male large enough to warrant an appointment of the fee, and, in default of appointment, a limitation to the first and other sons "in tail male" according to seniority, so that where it was intended to give an estate tail it was done in express terms, though the words used are ineffective for the purpose; and as a matter of construction, only give a life estate. But there can be no question, having regard to *Fitzgerald* v. *Fitzgerald* (1), that, if there had

(1) [1902] 1 I. R. 477.

Wylie, J. 1912. *In re* DAVIS'S ESTATE.

been a son of the marriage, and he had applied to the Court to rectify the settlement by inserting apt words to confer on him an estate tail, such relief would have been given as a matter of course.

Then we come to the limitations upon which the question for decision arises. In default of issue male of the said intended marriage to the issue female, as the husband or wife should appoint—a power large enough to include the fee—and, in default of appointment, "upon trust to permit and suffer the issue female, if any, of the said intended marriage to have, hold, and receive the rents and profits as tenants in common and not as joint-tenants, and, in default of all such issue," to the right heirs of James Tate, the husband. Now, when a draftsman, in settling a fee-simple estate, first gives life estates in express words limiting them for life, and then gives estates tail to the sons limiting them expressly "in tail male," and, in default of male issue, proceeds to divide the property between the daughters as tenants in common and not as joint-tenants, what estates would the ordinary man think he intended to give the daughters? Why did he not put in words of limitation as in the other cases? Simply because he intended to give the whole property, and not a limited estate. What is the object of making them tenants in common and not joint-tenants? It is simply to prevent the share of each from going over to the others on her death instead of going to her own issue, plainly showing an intention to give each an interest beyond her life.

Now, let us suppose for a moment that only life estates were intended to be given. How will the limitations work out? Suppose there were four daughters, each taking a fourth for life as tenant in common, what becomes of the fourth of each on her death? It cannot go to her surviving sisters. It cannot go to the right heirs of James Tate, because it is only "in default of all such issue" that the estate goes over, and it is plain it is to go over on one event *in globo*, and not in shares at different times. Counsel for the son of James Tate suggest that, in such case, I could imply cross-remainders for life amongst the daughters. But that would, in effect, be making them joint-tenants contrary to the words of the

deed, and, in a deed like this, it is as difficult to imply cross-remainders as it is to infer an intention to give the fee. Another suggestion was that in such a case, on the death of each daughter, there would be a resulting trust of her fourth to Robert James, the settlor, until the death of the last surviving daughter, when the whole would go over to the right heirs of James Tate. It seems to me inconceivable that such a thing could have been intended by the parties. The deed shows beyond doubt that Robert James, the settlor, intended to part with the fee. I think, therefore, that the words of the limitation over to the right heirs of James Tate also show that it was intended that, if there were any daughters to take under the limitation, they should take the fee. Having regard to the language used in the prior limitations, I see no difficulty in construing the words "in default of all such issue" as meaning in default of sons and issue male of the sons and of daughters to take under the limitations to them. This construction has the advantage of avoiding a hiatus in the disposition of the fee which would be caused by the construction contended for by counsel for John Tate.

It may be that others might think from the wording of this limitation over that the mistake in the drafting of this deed was the omission of the words "in tail" after the words "tenants in common"; but, for the reasons which I have given, the provisions of the deed leave no doubt in my mind that the parties intended that the daughters, if any, should take the fee. In either view the result would be the same, because the vendor has disentailed.

I will, therefore, make an order similar to that made by the Master of the Rolls in *Ex parte Rice* (1), and pay the money out to the vendor.

Solicitors for the vendor: *Stanuell & Son.*
Solicitor for John Tate: *G. A. Atkinson.*

J. E. W.

(1) 30 Ir. L. T. R. 57.

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BONUS—*continued.*

was accordingly lodged. *Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that the last agreement should be financed as a pending purchase-agreement, and that the percentage was payable on the amount advanced at the rate of 12 per cent. *In re Macnamara's Estate* App. 38

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CHARITY—*Will—Gift—"Religious or charitable purposes"—Validity—"Fail or become void by reason of death within three months"—Failure of bequest for other reasons.*] By her will, made three days before her death, a testatrix devised and bequeathed the residue of her property to *N.* upon trust, out of the rents and profits of her houses at *D.*, to pay to *B.*, the pastor of the Baptist Chapel, Harcourt Street, Dublin, or other the minister or pastor for the time being of said chapel, for a period of twenty-one years from the date of testatrix's death, an annuity of £25 per annum, to be applied by said *B.*, or such other minister or pastor as aforesaid, "for such religious or charitable purposes" as he should think fit, and, in case the bequest should "fail or become void by reason of my death within a period of three months," the annuity of £25 was bequeathed to *N.* for his own use. *Held*, that the bequest of the annuity to *B.* was a valid charitable gift, and that the gift over, in the events that happened, took effect. *Held*, also, that the gift over was a good gift, assuming that the bequest to *B.* failed on the ground of uncertainty. *Rickerby* v. *Nicholson* - Ross, J., 343

2.——*Will—Perpetuity—Society for the benefit of animals—Animals useful to man—Cats' Home.*]

CHARITY—*continued.*
A testatrix bequeathed to the Commissioners of Charitable Donations and Bequests £4000, New Consols, "upon trust to apply the income for the exclusive maintenance of the D. Home for Starving and Forsaken Cats . . . including the maintenance of the chloroform chamber now existing, or any other painless method of putting an end to cases of hopeless suffering, and the maintenance of the boarding department, but for no other purpose, as the D. Society for the Prevention of Cruelty to Animals are bound, under deed of 27th February, 1888, to provide for rent, taxes, repairs, caretaker's wages, and all other expenditure." *Held*, that the bequest in favour of the Home for starving and forsaken cats was a valid charitable gift. *Swifte* v. *Attorney-General* - - BARTON, J., 133

CHILDREN — *Will — Construction — Gift for "support" of children—Joint tenancy.*] A testator gave to his daughter *A* all the cash he had in bank, to be used by her for her own support and that of his children *B* and *C*, and gave to her all his stock-in-trade, and furniture and other effects, to be applied by her for the like purposes. *B* and *C* were adults at the date of the will. *Held*, that the word "support" was equivalent to "benefit," and that *A*, *B*, and *C* took the property absolutely and as joint tenants. *In re Nolan, deceased*; *Sheridan* v. *Nolan* - - - M. R. 416

CHOSE IN ACTION—Transfer of beneficial interest in - - - - 32, 278
See DEPOSIT RECEIPT.

COMPANY—Debentures—Pledge of assets—Priority - - - - 349, 363
See PLEDGE.
—— Winding up—Arrangement—8 Edward 7, c. 69, s. 120—Sanction of Court—Practice - - - - 24
See WINDING-UP.

COMPULSORY PURCHASE—*Lands Clauses Acts—Lessee's interest—Arrears of rent—Payment out of Court.*] A lessor cannot claim arrears of rent out of money lodged in Court under the Lands Clauses Acts as compensation for the interest of the lessee. *Ex parte Carey, In re Great Southern & Western Railway Company*, [1847] 10 L. T. (O. S.) 37, followed. *In re Dublin Corporation and Baker*; *Ex parte Thompson* - - - M. R. 498.

CONDITION—Policy of Insurance - 479
See SERVICE OUT OF THE JURISDICTION.
—— Will—Acting as trustee - - 279
See REVOCATION.
—— Will—Naturalization - - - 288
See FORFEITURE. 1.
—— Will—Return to England—Forfeiture 484
See FORFEITURE. 2.

CONDITIONS OF SALE—*Vendor and purchaser—Distillery—Deduction for expenses of sale.*] One of the conditions of sale, on the sale of a distillery, provided that "the purchaser shall, on completion of the purchase, be entitled to such of the said whiskey as may remain unsold, and also to the proceeds of sale, whether paid or unpaid, of such whiskey as shall have been sold after the 31st December, 1910, on payment by the purchaser, or deduction from such proceeds of sale, whether paid or unpaid, of £5 per cent. towards the costs and expenses of sale of such whiskey." *Held*, that the £5 per cent. was intended to cover all the costs and expenses for which the purchaser would be liable in connexion with the sale of the whiskey. *Allman* v. *M'Daniel* - - - M. R. 467

CONGESTED DISTRICTS BOARD—*Purchase by—Land Purchase Acts—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 79—*Vesting order under s.* 16—*Right of mining and taking minerals—s.* 13 (3)—*Reservation of, on resale.*] When the Congested Districts Board buy land under s. 79 of the Irish Land Act of 1903, the fee-simple is to be vested in the Board in the same manner and to the same extent as it is vested in the Land Commission by a vesting order made under s. 16, and the provisions of s. 13 (3), relating to the reservation to the Land Commission of the exclusive right of mining and taking minerals, do not apply to a vesting order made either under s. 16 or s. 79. On the resale by the Board of the land so purchased, if the Board elect to sell under the Act of 1903, the mineral rights must be reserved to the Land Commission, but, if otherwise, the mineral rights need not be so reserved, unless it is provided that they should be so reserved in the agreement between the Board and the purchasing tenant. *In re Burke's Estate* [Wylie, J., 201

—— Resumption of holding—Purposes of 174
See Resumption of Holding.

—— Sale of congested estate—Consent - 77
See Congested Estate.

CONGESTED ESTATE—*In congested districts county—Sale of holding without consent of Congested Districts Board—Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *sect.* 58, *sub-sect.* 2—"*Estate.*"] The prohibition in the Irish Land Act, 1909, sect. 58, sub-sect. 2 (2), of the sale of a congested estate in a congested districts county without the consent of the Congested Districts Board prohibits the sale without such consent of any part of such estate, or any holding thereon, under the Land Purchase Acts or any of them. The word "estate" in the sub-sect. means land coming within the definition of congested estate in section 6, sub-sect. 5, of the Irish Land Act, 1903, as amended by sect. 20, sub-sect. 1, of the Irish Land Act, 1909, and is

CONGESTED ESTATE—*continued.*
not restricted to estates declared to be such by the Land Commission or by the Congested Districts Board. Accordingly, where the owner of a congested estate in a congested districts county entered into agreements with the tenants on part of it for the sale to them of their holdings under the Land Law (Ireland) Act, 1896, and the Land Purchase Acts incorporated therewith, without obtaining the consent of the Congested Districts Board, the Court of Appeal, on the application of the Board, and on their undertaking to send in an offer to purchase the estate within a year, stayed the proceedings for the sale of these holdings. *In re Earl of Erne's Estate* - - - - App. 77

CONSENT—Congested Districts Board—Sale of congested estate in congested districts county - - - - - 77
See Congested Estate.

CONSOLIDATION—Mortgages - - 194
See Mortgage.

CONTRACT—Whether made within the jurisdiction—Ord. XI., 1 (*f*) - - 479
See Service out of the Jurisdiction.

CONVERSION OF ESTATE — Election — Evidence of - - - - 62
See Election.

COSTS—*Charged by order of Court on an estate—Interest whether payable thereon and from what date—Practice.*] Costs directed by a judgment or order to be charged on land bear interest from the date on which they become a charge. By a judgment of the Master of the Rolls it was directed that certain lands should be charged with certain costs when taxed and ascertained. The lands and others were subsequently sold in the Land Judge's Court. *Held*, reversing the decision of Ross, J., that interest at 4 per cent. on such costs should be allowed against the fund in Court from the date of taxation. *In re Drax*; *Savile* v. *Drax* ([1903] 1 Ch. 781) followed. *In re MacDermott's Estate* [Ross, J., 166; App. 170

—— Redemption of superior interest — Sale of demesne with a view to repurchase—Insufficiency of purchase-money — Liability of vendor - - - 97
See Superior Interest. 2.

—— Tenant for life—Leave to sell—Bonus 388
See Tenant for Life and Remainderman. 2.

COUNTY COURT—Transfer to—Practice 338, [398, 403, 406
See Transfer of Action to County Court. 1–4.

COVENANT TO RENEW — *Landlord and tenant—Lease for lives renewable for ever—Obligation on lessee to accept renewals—Implied covenant—Intention.*] In a lease for lives renewable for ever, the *habendum* was to the lessee, his heirs, and assigns, for the lives therein named, and of the survivors of them, "and the natural lives and life of all and every such other person and persons as shall from time to time for ever hereafter be named and added hereunto, pursuant to the covenant for perpetual renewal hereinafter contained." The lease contained (*inter alia*) a covenant by the lessee to repair the demised premises, and yield up the same in repair at the end or other sooner determination of the demise: also a covenant by the lessor to renew, upon the death of any life therein named or thereafter to be added, "so as the number of three lives may be always kept full according to the true intent and meaning of these presents," the lessee first paying unto the lessor a nominal fine, if demanded, for each new life to be added, and all arrears of rent . . . "it being the true intent and meaning of these presents and of the parties hereunto that (the lessee) nominating and appointing a life in the place or stead of any of the lives hereinbefore named, or hereafter to be named, and tendering renewals ready drawn, and paying the said fine, if demanded, and all arrears of rent . . . shall and may from time to time, and at all times for ever hereafter, have, hold, and enjoy, . . . the demised premises." *Held*, that the lease contained an implied covenant on the part of the lessee to accept renewals. *Ward* v. *McRoberts* (25 L. R. Ir. 225), and *Trench* v. *Wallace* ([1904] 1 Ir. R. 290), applied. *Hughes* v. *Commissioners of Public Works* - - - - BARTON, J., 156

DEBENTURES — Authority to Company notwithstanding to pledge their manufacture
See PLEDGE. [349, 363

DECLARATION OF ESTATE—*Estates Commissioners — Middleman — Rescission of purchase agreement—Irish Land Act*, 1903, *s.* 15 (1), (2).] A document in the following form:—"Declare an estate and sanction subject to marginal notes on Inspector's and Surveyor's reports being complied with," initialled at different times by two Estates Commissioners, is not a declaration that any particular lands are fit to be regarded as a separate estate for the purposes of the Act within the meaning of section 98, sub-section (1). Where a landlord and his immediate tenant of a holding (partly sublet with the landlord's consent) agree for a sale through the Land Commission, they may, at any time before a declaration is made by the Estates Commissioners, under sect. 15, sub-sect. (1), of the Act of 1903, mutually rescind the agreement, and thereupon all jurisdiction of the Land Commission under section 15, sub-sections (1), (2), with respect to that holding ceases. *In re Scully's Estate* - - WYLIE, J., 231; APP. 245

—— Decision of Judicial Commissioner—Appeal to Court of Appeal—Practice 231, 245
See APPEAL. 2.

DECLARATION OF TITLE — Action for—Transfer to County Court - 403
See TRANSFER TO COUNTY COURT. 3.

DELIVERY OF GOODS—Constructive 349, [363
See PLEDGE.

DELIVERY WARRANT—Whether requiring registration as bill of sale 349, 363
See PLEDGE.

DEMESNE LAND — Sale with a view to repurchase — Superior interest — Costs of owner of — Purchase-money insufficient to redeem - - - - - 97
See SUPERIOR INTEREST. 2.

DEPOSIT RECEIPT — *Assignment of chose in action—Transfer of beneficial interest in—Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *sect.* 28 (6).] In order to transfer the beneficial interest in a deposit receipt, a written assignment is unnecessary. It is sufficient if the deposit receipt is surrendered to the bank, and a new deposit receipt taken out, with intent to pass the beneficial interest, in the names of the persons to whom the depositor intends to pass the beneficial interest. *S.*, the owner of a deposit receipt for £900, surrendered the same to the bank, and directed a new deposit receipt to be made out in the names of himself and his two nephews, with the intention that the interest in the same should at his own death pass to his nephews. *S.* subsequently died. *Held*, affirming the decision of Ross, J., that there had been an effectual transfer of the beneficial interest, and that at the death of *A.* the same passed to the two nephews. *McEneaney* v. *Shevlin* [ROSS, J., 32; APP. 278

DISENTAILING DEED — Condition subsequent - - - - - 288
See FORFEITURE. 1.

DISTILLERY—Sale of, as going concern—Expenses of sale of whiskey—Conditions of sale - - - - - - 467
See CONDITIONS OF SALE.

DRIFT NET—Legality of, in Ireland - 287
See FISHERY ACTS.

EASEMENT — Right of way — Implied grant
See WAY. [262

—— Vesting of holding in tenant purchaser—Rectification of fiated agreement
See RECTIFICATION. 1. [212, 215

ELECTION—*Settled lands—Trust for sale—Election to take balance of proceeds as realty—Conversion—Reconversion—Acts showing intention.*] A testator by his will devised all his real and personal estate to his trustees, and, after directing them to complete the purchase of the reversion in fee of part of the lands of *D.*, held by him under a sub-lease (which was subject to his mother's life interest therein under a prior will), declared that his trustees should, at their discretion, at any time after the death of his mother, or during her lifetime with her consent, sell his interest in the lease of *D.* and the reversion in fee expectant on the determination of said lease and his other property at *D.*, which was held by him under chattel tenure, and if sold during his mother's lifetime he directed his trustees to pay the income arising from the produce of such sale to her during her life, and, after her death, out of said purchase-money to pay (*inter alia*) a legacy of £1000 to his sister *E.*, and declared that any balance, after the payments aforesaid, should form part of his residuary estate and be added thereto. And testator further directed that his trustees should stand possessed of (*inter alia*) his freehold lands of *K.* and other property, and, at their discretion, from time to time, sell the same or any part thereof, and out of the amount realized by such sale make certain specified payments, including (*inter alia*) a debt of £287 due to his mother and then a sum of £2500 to his sister *H.* (which by a codicil to his will he directed should not be raised till after his mother's death, but that all interest thereon should be paid to her meanwhile), and a life annuity of £100 to his sister *W.*, and to apply the balance in clearing off certain charges therein mentioned, and testator left all the residue of his property to his sister *H.* absolutely. *H.* was one of the trustees appointed under said will, and from 1902 was sole surviving trustee thereof. The testator died in 1893. The trustees thereupon completed the purchase of the reversion in fee of part of the lands of *D.*, as directed by the will. The trusts for sale contained in the will were not carried out. The premises subject to the second trust for sale were insolvent as to income, but solvent as to capital, the balance of the income, after providing for prior charges, being always divided equally between *H.* and *W.* on foot of their respective charge and annuity. With regard to the premises subject to the first trust for sale, in 1900, *H.* put an indorsement on two leases of portion of the lands of *D.* held under chattel tenure in which she described herself as residuary legatee of the testator, and further accepted and made leases of portion thereof; and, with regard to the premises subject to the second trust for sale, in 1910, *H.* presented an Originating Request for the sale of the freehold lands of *K.* to the Irish

ELECTION—*continued.*

Land Commission, and therein described herself as "absolute owner" of said lands. *H.* predeceased her mother, and died in 1910. On questions arising, between the heir-at-law and the next-of-kin of *H.*, as to who was now entitled to (*a*) the reversion in fee of part of the lands of *D.*, and (*b*) the freehold lands of K:—*Held* (assuming, in the case of both trusts for sale, that a conversion took place) first, in the case of the first trust for sale, that *H.* was capable of declaring whether she would take the balance devised and bequeathed to her in its unconverted state or not; that, although the question was only material with reference to the reversion in fee of part of the lands of *D.*, her intention might be inferred from her acts with reference to the other parts of the lands of *D.* held under chattel tenure; and that her acts in relation thereto afforded evidence of an unequivocal declaration of intention to retain that balance in its unconverted form. *Meek* v. *Devenish* (6 Ch. D. 566), and *In re Potter* (3 T. L. R. 430), applied. Secondly, that, in the case of the second trust for sale, the act of *H.* in describing herself as "absolute owner" in the Originating Request presented for the sale of the freehold lands of *K.* was sufficient evidence that she had elected to hold these lands as real estate subject to incumbrances, and not as a balance of money coming to her, after conversion under the will. *In re MacDougall, deceased; Hart* v. *MacDougall* BARTON, J., 62

ESTATE—Declaration of—Land Purchase Acts
See APPEAL. 2. [231, 245
DECLARATION OF ESTATE.

—— *In fee*—Rectification of Settlement 516
See RECTIFICATION. 3.

—— Purchase of lunatic's estate—Fee farm grant and moiety of fee farm rent
See LUNATIC. [140, 306

ESTATE TAIL—Barring—Estates arising on condition subsequent - 288
See FORFEITURE. 1.

EVICTED TENANT — Registered owner—Judgment mortgage - - 91
See LOCAL REGISTRATION OF TITLE.

EVIDENCE—Election—Trust for sale—Originating request for sale by *cestui que* trust
See ELECTION. [62

—— Intrinsic—Rectification of settlement 516
See RECTIFICATION. 3.

—— Several fishery—Grants from the Crown—User - - - - - - 61
See FISHERY.

EXECUTION OF POWER—*Excessive exercise—Invalidity of ultimate appointment to an object of the power.*] The donee of a power of appointment among her three children appointed the property to a person not an object of the power for life, and after his decease to other persons not objects of the power, and in case none of the said persons should live to take the property, then she gave the same to an object of the power. Two of the persons who were not objects of the power, but in whose favour the testatrix purported to make an appointment, survived the testatrix. *Held*, that the ultimate limitation to an object of the power, being dependent on the former void appointments, failed. *In re Enevers; Power* v. *Power* - Ross, J. 511

EXECUTOR—*Legatee indebted to firm of which testator was a member—Executor not entitled to retain legacy.*] An executor cannot, as a general rule, retain a legacy in satisfaction of a debt which was due by the legatee, not to the testator, but to a firm in which the testator was a partner. *Jackson* v. *Yeats* - - - BARTON, J., 267

—— Trusts for sale—Persons who had been appointed trustees and executors described as "my said executors"—Will—Construction - - - - - 410
See TRUSTEES. 1.

FAIR RENT—*Fixing of—Vendor and purchaser—Fee-farm grant—Land Law (Ireland) Acts—Redemption of Rent Act*, 1891—*Realty or personalty.*] *T.*, being *sui juris*, and being absolutely entitled to the grantee's interest under a perpetuity grant, served an originating notice under the Redemption of Rent (Ireland) Act, 1891, in pursuance of which a fair rent was fixed by the Irish Land Commission upon the lands. He afterwards died intestate. *Held*, that *T.'s* interest in the land became on the fixing of the fair rent and was at his death personal estate. *In re Temple and Lyons's Contract* - - - - BARTON, J., 12

2. —— *Present tenancy determined prior to the passing of the Irish Land Act*, 1909—*Construction of section* 65 (1)—"*Next-of-kin or issue*" *of tenant.*] *M. K.*, the father of the applicant, held the lands of Shancloon and Immonbeg, containing 289 acres, Government Valuation over £100, under a lease of the 1st March, 1867, for a term of thirty-one years or three lives, from the 1st June, 1863. This lease contained no provisions restricting the user of the lands, which were suitable for the purposes of a mixed farm, and there was evidence that they were in fact so used. *M. K.*, who was then acting as agent for the landlord, on the 17th February, 1887, signed two documents giving a history of the lands of Shancloon and Immonbeg, which went to show that the main object of the lease of 1867 was for the purposes of pasture. In 1889 *M. K.* was adjudicated a bankrupt, and in 1891 he was evicted for

FAIR RENT—*continued.*
non-payment of rent, and the tenancy was never redeemed. The lands of Shancloon, Government Valuation under £100, were let to *M. K.'s* wife for seven years, and on the 20th December, 1900, for a term of fifteen years from the 1st November, 1898, for the purposes of pastnre. On the 3rd June, 1902, *M. K.'s* wife assigned the holding to her son, the applicant, who subsequently paid the rent, and was given receipts in his own name. *M. K.* died intestate in 1903, leaving the applicant, his eldest surviving son, heir-at-law. From 1891 to her death in 1903, *M. K.'s* wife resided on the holding, and from 1905 the applicant resided there, and worked the lands as a mixed farm. *Held*, by the Court of Appeal (affirming the decision of FitzGerald, J.), that the applicant came within the provisions of sect. 65 (1) of the Irish Land Act, 1909, as "one of the next-of-kin or issue" of *M. K.*, and that he was entitled to have a fair rent fixed. *Concannon and St. George, Landlords*; *Keane, Tenant*
[APP. 429

3. —— *Present tenancy determined prior to the passing of the Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42) — *Construction of section* 65 (1) — "*Subject to the provisions of the Land Law Acts*"—*Date at which applicability of the Acts is to be ascertained — Land Law (Ireland) Act*, 1896 (59 & 60 Vict. c. 47), *section* 5 (1) (*c*) (ii)—*Residence of tenant on adjoining holding.*] To entitle an applicant, otherwise duly qualified, to have a fair rent fixed under section 65 (1) of the Irish Land Act, 1909, it is sufficient if, at the time of the application, the lands come within the provisions of the Land Law Acts in that behalf. Accordingly, where a present tenancy within the definition of the Land Law (Ireland) Act, 1881, was after the Land Law (Ireland) Act, 1896, and prior to the passiug of the Irish Land Act of 1909, determined by notice to quit, and the holding was relet for the purposes of pasture to a son of the outgoing tenant, who at the time of the application hereinafter mentioned was presumed to be dead; and the new tenant, at the date of his application to have a fair rent fixed in respect of the holding, was in occupation thereof, and resided on an adjoining holding of which also he was the occupying tenant: *Held*, reversing the decision of FitzGerald, J., that a fair rent should be fixed. *Concannon and St. George, Landlords*; *Keane, Tenant*, ante, p. 429, followed. *Gaffney, Tenant*; *Fetherstonhaugh, Landlord* ([1900] 2 I. R. 417, 422), does not apply to cases under section 65 (1). *Reilly, Tenant*; *Lynch Blosse, Landlord* - - - - - APP. 445

FEE FARM GRANT — Redemption of Land Act, 1891 — Effect of fixing fair rent—Conversion - - - - 12
See FAIR RENT. 1.

FEE FARM GRANT—*continued.*
—— With moiety of fee farm rent vested in lunatic—Sale to Estates Commissioners *See* LUNATIC. [140, 306

FISHERY—*Several—Navigable non-tidal lake—Public user — Prescription — Evidence — Crown grants.*] On appeal by the defendants from the judgment of the Court of Appeal ([1909] 1 I.R. 237), the House of Lords affirmed the decision of the Court of Appeal, *diss.* Earl Loreburn and Lords Shaw and Robson, who held that there was no satisfactory evidence to show any actual possession or any right in the Crown or the grantees to the exclusive fishery claimed. *Johnston* v. *O'Neill* [H. L. 61

FISHERY ACTS — *Drift-nets—Legality of—Nuisance—"Fixed engines"—13 & 14 Vict. c. 88, s. 1; 26 & 27 Vict. c. 114, s. 4.*] On appeal by the plaintiffs from the judgment of the Court of Appeal, dated the 27th February, 1911 ([1911] 1 I.R. 323, 353), the House of Lords affirmed the judgment of the Court of Appeal and dismissed the appeal with costs. *Irish Society* v. *Fleming* [H. L. 287

FIXED NET OR ENGINE—Drift-net 287
See FISHERY ACTS.

FORFEITURE — *Will — Construction — Conditions as to naturalization—Impossible condition—Condition subsequent—Disentailing assurance—Effect of, on subsequent limitations.*] A testator devised his real estate to *A.* (a German subject) and the heirs of his body, on the express condition that he should within two years from the date of testator's death become a British subject, and take upon himself the testator's name, and should not afterwards divest himself of his status as a British subject, or of such name; the testator further provided that if *A.* refused or neglected to comply with the said conditions, his said real estate should go (subject and upon the same conditions) to *A.'s* sister (who was also a German subject) and the heirs of her body, with similar remainders over. On the testator's death *A.* executed a disentailing assurance of the lands. *Held* (1) that notwithstanding the provisions of the Naturalization Act, 1870, requiring five years' residence as a condition of naturalization, the condition as to naturalization was not an impossible condition, as it was not impossible to obtain a private Naturalization Act within two years from the date of testator's death; but (2) that the conditions as to naturalization and taking testator's name were conditions subsequent; and that the effect of the disentailing assurance executed by *A.* was to defeat subsequent estates which would have otherwise taken effect after the determination of, or in defeasance of, the estate tail devised to *A.*; and (3) that *A.* was,

FORFEITURE—*continued.*
accordingly, entitled to an estate in fee simple in the lands freed from the conditions. *In re Knox, deceased*; *Von Scheffler* v. *Shuldham* [BARTON, J., 288

2. —— *Will — Construction — Conditional gift of annuity—"To cease on return to England."*] A testator bequeathed an annuity to his nephew *C.* subject to the condition that "should the said *C.* return to Ireland, England, or Scotland," the annuity was to cease. *C.*, who resided in New Zealand, took a passage to and landed in England, alleging that he was on his way to Jersey. The facts proved were consistent with his statement, and it was in evidence that the usual way of travelling to Jersey from New Zealand was through England. Shortly after landing in England he committed murder and was convicted in England, but was found to be insane, and was detained in a criminal lunatic asylum. *Held*, that *C.* had forfeited the annuity. *In re Crumpe, deceased*; *Orpen* v. *Moriarty* - - - BARTON, J., 485

FUTURE TENANT — Next-of-kin or issue of tenant of present tenancy determined before Irish Land Act, 1909—Status of tenancy under sect. 65 (1) to be ascertained at time of application to fix fair rent - - - - 429, 445
See FAIR RENT. 2, 3.

GENERAL WORDS — Conveyance — Easement - - - - - - 262
See WAY.

HOLDING—Resale to vendor under sect. 3 of Irish Land Act, 1903 - - 493
See SUB-DIVISION.
—— Resumption of—Congested Districts Board *See* RESUMPTION OF HOLDING. [174
—— Sale of, to tenant—Fiated agreement—Error in—Motion to amend—Jurisdiction, Land Commission - 212, 215, 473
See RECTIFICATION. 1, 2.

HOTEL—Noise all night by frequenters of neighbouring restaurant - - 327
See NUISANCE.

INJUNCTION—Action in substance for trespass—Separate valuation—Transfer to County Court - - - 338
See TRANSFER OF ACTION TO COUNTY COURT. 1.
—— Ancillary to trespass—Trial of issue at Assizes - - - - 398
See TRANSFER OF ACTION TO COUNTY COURT. 2.
—— Noise at night—Reasonable user of premises *See* NUISANCE. [327

INSOLVENT ESTATE—Arrears of interest on charges - - - - - 488
See BONUS. 1.
—— Vendor entitled to aid in receipt of annuity charged thereon - - - 424
See BONUS. 2.

INSURANCE.
See POLICY OF INSURANCE.

INTEREST ON MONEY—Costs charged by order of Court on estate - 166, 170
See COSTS.
—— Mortgage—Arrears of—Bonus - 488
See BONUS. 1.

ISSUE—*Will—Construction—Life interest to daughter and to surviving husband—Remainder to "issue" upon death or re-marriage of husband—"Issue," meaning of—Word of purchase or of limitation—Shelley's Case, Rule in—Perpetuities, Rule against.*] By his will, dated 31st October, 1883, a testator appointed trustees, and gave to them his property of every kind with powers of management, and provided as follows:—"And as to the rest, residue, and remainder of my property I direct the income thereof to be paid to and amongst my four children (naming them) in equal shares during their natural lives, and after the decease of any one or more of them leaving a husband or wife him or her surviving, then the share of such deceased child or children to be in trust for such husband or wife him or her surviving, for the term of each of their natural lives or until they re-marry, and after their respective deaths or re-marriage then to the issue (if any) of such deceased child, and in case of no such issue to go to or amongst my surviving children or child, or their, his, or her issue; and I further direct that all the benefits conferred by this my will shall be had and enjoyed without power of anticipation by the persons or person for the time being otherwise entitled for their lives or life as aforesaid." The testator died 22nd August, 1889. One of the testator's children was married and had children living at the date of the will. The other three children were married after the date of the will. The bulk of the property subject to the trusts consisted of chattels real, and there was also some real estate. *Held*: (1) that in the devise "to the issue (if any) of such deceased child" the word "issue" was a word of purchase and not of limitation, both as regards the real and personal estate of testator. (2) That the word "issue" included all descendants, limited in each case to such of them as were living at the time when the gift in each case took effect. (3) That, as the class constituting "issue" might not be ascertainable within legal limits, the gift to such issue, as well as the gift over in default of issue, was void as infringing the rule against perpetuities. *In re Taylor's Trusts; Taylor* v. *Blake.*
[WYLIE, J., for M. R. 1

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LOCAL REGISTRATION OF TITLE—*54 & 55 Vict. c. 66, s. 21—Registration of judgment mortgages — Duty of registering authority.*] The Registrar of Titles acting pursuant to the Local Registration of Title (Ireland) Act, 1891, is bound to accept the affidavit of a judgment creditor seeking to register a judgment against the interest of an owner of registered land, except only in a case in which the ownership of the lands as stated in the affidavit is, on the face of it, displaced by the register or other documentary evidence connected therewith. A judgment creditor applied under the Local Registration of Title Act for the registration of a judgment as a burden against the interest of the registered owner of the lands. The registration was objected to by the registered owner on the ground that the lands had been purchased by him as an evicted tenant entitled to the protection afforded by section 11 (2) of the Evicted Tenants (Ireland) Act, 1907. *Held*, that it was the duty of the Registrar in his ministerial capacity to enter the judgment as a burden on the lands without prejudice to the right of the registered owner to seek to remove the blot on the title by subsequent proceedings in manner provided by the rules made pursuant to the Local Registration of Title Act. *In re Phelan* - MADDEN, J., 91

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LUNATIC — *Estate — Sale to Estates Commissioners — Fee-farm grant and moiety of reserved rent — Will — Devise — Ademption — Lunacy Regulation (Ireland) Act*, 1871, *ss.* 63, 67—*Irish Land Act*, 1903, *s.* 26.] *N.* devised his share of certain lands to *L.* These lands were held in feefarm, and *N* was entitled to a moiety of the fee-farm rent as well as to the lands comprised in the grant, the other moiety of the rent being vested in *L.* In 1905 he lodged an originating request with the Estates Commissioners for the purpose of selling to the tenants. *N.* was afterwards found a lunatic by inquisition, and the Estates Commissioners, in the year 1908, sent in a

LUNATIC—*continued.*
proposal to the committee of the lunatic's estate to purchase the lands for the sum of £5,136. This proposal was submitted to the Lord Chancellor, who, on the 18th May, 1908, made an order declaring that the sale was for the benefit of the lunatic, and just and reasonable, that the committee should be at liberty to carry out such sale, and to apply that the net amount available in respect of the purchase-money should be transferred to the credit of the lunacy matter, and separate credit of the sale of the lands. The sale was accordingly carried out, and on the 15th January, 1909, an order was made by the Lord Chancellor in the lunacy matter, giving the committee of the estate liberty to consent to the redemption of *L's* moiety of the fee-farm rent at the sum of £2,500, and in pursuance of consent under that order the moiety of the fee-farm rent was redeemed at £2,450, paid out of the purchase-money, and the balance was transferred to the credit of the lunacy matter. After the death of *N.* questions were raised by his heir-at-law and next-of-kin whether the devise of his share in the lands, so far at least as the moiety of the fee-farm rent was included in it, was adeemed by the sale. *Held*, affirming the decision of the Master of the Rolls, that the sale having proceeded under section 26 of the Irish Land Act, 1903, section 67 of Lunacy Regulation (Ireland) Act, 1871, negatived ademption. *Latham* v. *Travers.* - - M. R. 140; APP. 306

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MORTGAGE — *Construction — Habendum — Proviso for redemption—Effect of, in charging prior mortgage debts on additional property.*] By deed dated 15 April, 1872, *A* mortgaged certain lands to *B* (a corporate body) to secure £32,000. By deed dated 31st October, 1872, *A* mortgaged the same lands to *B* to secure a further sum of £5,000. The deed contained a proviso for redemption on payment of the said sums of £32,000 and £5,000. By a third deed dated 9th July, 1874, reciting the two prior mortgages, *A* mortgaged the lands therein, together with other lands at *N.*, to *B* to secure a further sum of £6,000. The habendum in the last-mentioned deed was "to

MORTGAGE—*continued.*
have and to hold the said lands and hereditaments hereinbefore expressed to be firstly granted," *i.e.* the lands mortgaged in 1872 "to *B*, its successors and assigns, to the use of *B*, its successors and assigns for ever, but subject nevertheless" to the said recited mortgages, "and also to the proviso for redemption hereinafter mentioned, and to have and to hold the said lands and hereditaments and all other the premises hereinbefore expressed to be hereby secondly and thirdly granted," *i.e.* the additional lands at *N.* "to *B*, its successors and assigns, to the use of *B*, its successors and assigns for ever," subject to the rents and covenants in certain fee-farm grants, "and subject to the proviso for redemption hereinafter contained; that is to say, provided, and it is hereby agreed and declared, that if the said *A*, his executors, administrators, or assigns, shall on the 4th day of October, 1874, pay to *B*, its successors and assigns, the said sum of £6000, with interest at the rate of £5 10*s.* per cent. per annum, ... then the said *B*, its successors or assigns, shall at any time thereafter, upon the request and at the cost of the said *A*, his executors, administrators, or assigns, and upon payment also of said sum of £32,000 and interest, so secured as aforesaid by the said indenture of the 15th day of April, 1872, and also of the said sum of £5000 and interest, so secured as aforesaid by the said indenture of 31st October, 1872, reconvey the said lands, hereditaments, and premises, hereinbefore expressed to be granted and released, unto and to the use of the said *A*, his heirs and assigns, or as he or they shall direct"; and it contained a proviso that, notwithstanding anything therein contained, *B* should not be compelled to reconvey the lands or any part thereof until the aforesaid sums of £32,000 and £5000, as well as the said sum of £6000, should be fully paid and satisfied. The lands, the subject of the mortgages of 1872, were afterwards sold to the tenants in the Land Commission Court, and the other lands, the subject of the mortgage of 1874, were about the same time sold in the Land Judge's Court on the petition of *A* as owner. *Held*, by Ross, J., that the proviso in the deed of 1874 did not amount to an exercise by the mortgagee of his right to consolidate. *Held*, by the Court of Appeal, that by the deed of 9th July, 1874, all the three mortgage debts were charged on the additional lands at *N*: *Mostyn* v. *Lancaster*; *Taylor* v. *Mostyn* (23 Ch. D. 583) applied. *In re Thomson's Estate.* - - Ross, J., 194; APP. 460

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NATURALIZATION — Condition in will — Impossibility — Condition subsequent —Tenant in tail— Disentailing deed
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NOISE—Caused at night by frequenters of restaurant— Nuisance to neighbouring hotel - - - - - - 327
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NUISANCE—*Injunction—Noise at night—Large city— Singing and dancing — Reasonable user of premises—Substantial discomfort.*] The plaintiffs, the proprietors of a hotel in the city of Belfast, applied for an injunction to restrain the defendant, the proprietor of tea-rooms and a restaurant on the opposite side of the street, from using his premises for the purpose of music, dancing, or other entertainments, so as to cause a nuisance to the plaintiffs, their servants, and guests. The plaintiffs complained of interference with the sleep of their servants and guests, and required that defendant's premises should be altogether closed after midnight. *Held*, under the circumstances the plaintiffs were entitled to a limited injunction to restrain the defendant from causing a nuisance by keeping the windows open after midnight while music and dancing were going on, and from permitting persons entering or leaving the premises after midnight to cause a nuisance by singing or other noise. Among the noises, which, if they do not cause substantial discomfort, residents in large industrial cities may have to put up with, is a certain amount of noise which accompanies and is incident to the reasonable recreation of a crowded population. The question, in every such case, is whether such noises amount to a sensible or substantial interference with the comfort of neighbouring dwellers, according to ordinary sober common-sense standards. *New Imperial and Windsor Hotel Co.* v. *Johnson* - - - BARTON, J., 327

—— Drift-net fishing exercised simultaneously but independently — Injury to several fishery - - - - - - 287
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PARTNERSHIP—Debt due to, by legatee of one partner — Executor whether entitled to retain legacy - - - - - 267
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—— Trustee for sale—Land agents—Negotiation fee - - - - - - 341
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PAYMENT OUT OF COURT—*Land Purchase Acts—Purchase-money of lands sold paid out—Miscarriage—Jurisdiction of Land Commission to order re-lodgment.*] Where the purchase-money of lands sold under the Land Purchase Acts has been paid out to any person through a miscarriage, the Court has jurisdiction to order the person to whom the money has been so paid to re-lodge the same in Court. *In re Gage's Estate* (17 L. R. Ir. 111) applied. *In re Persse's Estate* - WYLIE, J., 18

2. —— *Mistake—Recoupment—Order to bring back into Court moneys overpaid.*] In a debenture-holder's action, brought by trustees for debenture-holders against an insolvent company, the realized assets were insufficient to pay debenture-holders in full. The allocation schedule was, by mistake, framed on the basis that certain banking companies, who held debentures as security for advances made by them to the company, should receive dividends on the amounts of the debts due to them, instead of on the face value of their debentures. As a result, the amount allocated to the banking companies was less than it should have been, and certain debenture-holders, directors of the company and parties to the action, were consequently overpaid. Upon motion by the plaintiff, who had carriage of the suit, the directors were ordered to bring back into Court the amounts by which they had been overpaid. *Platt* v. *Casey's Drogheda Brewery Co.* - - - BARTON, J., 279

—— Lands Clauses Act—Leasehold—Arrears of rent - - - - - - 498
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PERPETUITY—Limitation in favour of issue 1.
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PLEDGE—*Company — Debentures — Priority — Validity of pledge—Constructive delivery—Warrant —Bill of sale—Registration—Companies Act*, 1900, *sect.* 14—*Bills of Sale (Ireland) Act*, 1879, *sect.* 4.] A distillery company, with power to create debentures and to borrow on mortgage, having issued a first series of debentures, proceeded to issue a second series of debentures, which provided that, although nothing therein contained should be taken to authorize the creation of any mortgage or charge on the property of the company in priority to such debentures, the company might by delivery warrants or other means pledge to their bankers or others their manufactured whiskey, to secure

PLEDGE—*continued.*
advances for the purposes of the company's business. The plaintiff advanced moneys to the company on the security of their manufactured whiskey lying in the bonded warehouse of the company as follows:—On the occasion of each advance the name of the plaintiff was entered in the company's stock-book opposite the particulars of whiskey intended to be pledged, and a delivery warrant and invoice, each containing particulars of such whiskey, were delivered to the plaintiff. The assets of the company, including the whiskey pledged to the plaintiff, were realized by the receiver appointed in an action brought on behalf of the first debenture-holders of the company, and proved insufficient to pay the plaintiff's claim and those of the second debenture-holders in full. In an action brought by the plaintiff against the trustees for the second debenture-holders, and the company: *Held*, by the Court of Appeal (the Lord Chancellor and Holmes, L.J., affirming Barton, J.; Cherry, L.J., dissenting), (1) that the agreement to pledge, followed by the transfer of specific whiskey into the plaintiff's name in the books of the company, effected a valid pledge of the whiskey so transferred, independently of the warrants; and that the plaintiff was entitled to the security so obtained in priority to the second debenture-holders; (2) that the warrants delivered to the plaintiff did not require registration as bills of sale under section 14 (*c*) of the Companies Act, 1900, and section 4 of the Bills of Sale (Ireland) Act, 1879. *Per* Holmes, L.J., that the warrants came within the class of documents excluded from section 4 of the Bills of Sale (Ireland) Act, 1879, as being "documents used in the ordinary course of business as proof of the possession or control of goods." *Held*, by Cherry, L.J., that the transactions between the plaintiff and the company amounted to mortgages of the whiskey, and not pledges; that there was no constructive delivery of possession of the whiskey to the plaintiff; and that the warrants required registration as bills of sale. *Doherty* v. *Kennedy*.
[BARTON, J., 349; APP. 363

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—— Whether personal or annexed to office—Will—Construction - - - - 410
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—— Chancery Division—Company—Winding up—Scheme of arrangement—Companies Act, 1908, s. 120—Sanction of Court—Procedure - - - - - 24
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—— Estates Commissioners—Declaration under section 15 (1), (2), Land Act, 1903 [231, 245
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PRESENT TENANCY—Determined before Irish Land Act, 1909—Application to fix fair rent under sect. 65 (1) 429, 445
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PRIORITY—Debenture—Pledge - 349, 363
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PUBLIC TRUSTEE— *Land Purchase Acts—Sale of settled lands — Purchase-money paid to trustees of settlement — Jurisdiction of Land Commission and Land Judge to appoint public trustee subsequently—Irish Land Act*, 1903, (3 *Edw.* 7, *c.* 37), *s.* 52.] Where settled lands have been sold under the Land Purchase Acts and the purchase-money has been paid out to the trustees of the settlement, a Judicial Commissioner or the Land Judge, as the case may be, has jurisdiction, where the trustees have since died, to appoint the public trustee trustee of the settlement, in relation to the purchase-money of the lands so sold. *In re Trench's Estate* - - - - - WYLIE, J., 295

RATES—*Union comprising county borough and portions of counties—Revaluation of county borough —Mistake in apportionment of Union charges—Liability of contributory bodies—Local Government (Ireland) Act*, 1898, *sections* 47, 65, 80.] The yearly expenses of the Belfast Guardians are payable by the Corporation of Belfast and the County Councils of Antrim and Down, in certain proportions determined by section 65 (2) of the Local Government (Ireland) Act, 1898, upon the prescribed demand by the guardians. On the 15th January, 1908, the guardians transmitted to the Corporation of Belfast, and to each of the said County Councils, an estimate and demand for the then ensuing financial year; but, owing to an error in the mode of apportionment, a sum of £601, which should have been demanded from the said County Councils, was, in fact, demanded from the Corporation. The County Councils duly paid to the guardians the amounts included in the estimates and demands served upon them, but the Corporation refused to pay more than their due apportioned amount of the sum required for expenses by the guardians. On the 14th January, 1910, the guardians transmitted to each of the said bodies an estimate and demand for the then ensuing financial year, based upon a proper apportionment, and as the said sum of £601 still remained unpaid, the guardians excluded it in estimating their revenue for such ensuing financial year, thereby increasing the total amount required by them to meet their expenses for the said year by £601. The Local Government Board, at the instance of the guardians, made an order on the 23rd March, 1910, extending the time for the two County Councils to pay their respective portions of the said sum of £601, and within such extended time no payment in fact of the said sum having been made, the guardians brought an action against all the said bodies for recovery thereof. *Held*, that inasmuch as the liability to pay arose under section 43 of the Local Government Act of 1898, and prior to and independently of the making of an estimate and demand by the guardians under section 51 (1), the guardians

RATES—*continued.*

were entitled to recover from the County Councils their respective portions of the said sum of £601, notwithstanding the lapse of time, and that no demand therefore had ever been transmitted to them. *Belfast Guardians* v. *Belfast Corporation and County Councils of Antrim and Down.*

[ROSS, J., 104; APP. 120

RECTIFICATION—*Land Commission — Jurisdiction—Amendment of fiated and registered purchase agreement — Injury to third party — Easement—Land Law Act*, 1896, s. 32 (3)—*Local Registration of Title Act*, 1891, *s.* 34 (2).] Where a purchase-agreement, duly fiated and registered, reserved a right of way over the land comprised therein in favour of a purchaser from the Land Commission of an adjacent holding: *Held*, reversing the decision of Wylie, J., that there was no jurisdiction in the Land Commission to make an order under section 32, sub-section (3), of the Land Law (Ireland) Act, 1896, to amend the agreement and rectify the register by omitting the reservation, inasmuch as same could not be done without injury to the person in whose favour the right of way was reserved, within the meaning of section 34, sub-section (2), of the Local Registration of Title (Ireland) Act, 1891. *In re Leonard's Estate* - - WYDIE, J., 212; APP. 215

2. —— *Land Commission—Jurisdiction—Amendment of fiated and registered purchase-agreement—Stranger's land included in holding vested in tenant-purchaser—Local Registration of Title Act*, 1891, *section* 34, *sub-section* (2)—*Land Law (Ireland) Act*, 1896, *section* 32, *sub-section* (3).] The decisions of this Court in *In re Wilson's Estate* (42 Ir. L. T. R. 122), and *In re Leonard's Estate* (*ante*, p. 215), are applicable to a case where land, claimed by a stranger to the proceedings as his property, has been, by accident, neglect, or oversight, included in the premises vested as the holding in the tenant-purchaser; and therefore, if there be a *bona fide* dispute as to whether the premises so claimed did in truth form part of the holding, the Land Commission have no jurisdiction through the Judicial Commissioner to entertain a motion under section 32, sub-section (3), of the Land Law (Ireland) Act, 1896, to amend the fiated agreement. *In re Hussey's Estate* - - - APP. 473

3. ——*Settlement—Legal interests in settled realty —Omission of words of inheritance—No evidence of intention* de hors *the deed—Settled lands sold under the Land Purchase Acts.*] By marriage settlement, executed in 1843, reciting (*inter alia*) that the intended husband had agreed to make a suitable provision for the issue of the marriage, and that he was to receive with his intended wife a marriage portion, certain lands, held under lease

RECTIFICATION—*continued.*
for ever, were (with others held for estates *pur autre vie*) conveyed to trustees and the survivor of them and the heirs of the survivor upon trust to permit the principal settlor to receive the rents and profits of the portion of the said lands conveyed by him for his life, then to permit the husband to receive the rents and profits of the whole for his life, then, subject to a jointure for the wife in case she survived, upon trust to permit the issue male, if any, of the intended marriage to receive the rents and profits in such shares as the husband, or the wife in case she survived him, should appoint, and, in default of appointment, to permit the first and every other son and sons of the husband to receive the rents and profits in tail male according to seniority, and, in default of issue male, upon trust to permit the issue female, if any, of the intended marriage to receive the rents and profits in such shares as the husband, or the wife in case she survived him, should appoint, and, in default of appointment, *to permit the issue female, if any, to receive the rents and profits as tenants in common and not as joint-tenants*, and, in default of all such issue, then upon trust to permit the right heirs of the husband to receive the rents and profits for ever. There was only one child issue of the marriage, a daughter, who duly entered into possession under the settlement, and subsequently sold the said lands under the Land Purchase Acts. On a question arising as to the nature of the interest taken by the vendor:—*Held*, that, from the provisions of the settlement, it was clearly the intention of the parties that, in default of appointment, the issue female should take estates in fee-simple, and that the settlement should be treated as rectified accordingly, and the residue of the purchase-money paid out to the vendor. *Fitzgerald* v. *Fitzgerald* ([1902]1 I. R. 477), and *Ex parte Rice* (30 I. L. T. R. 57), considered and applied. *In re Davis's Estate* - - - WYLIE, J., 516

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—— Superior interest.
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RESUMPTION OF HOLDING—*Land Law (Ireland) Acts—Congested Districts Board—Right of resumption of holding—Limitation of right of resumption — Purposes of resumption — Migration and enlargement of holdings—Land Law (Ireland) Act*, 1881, *ss.* 5, 8 (3)—*Land Law (Ireland) Act*, 1896, *s.* 3 (1)—*Irish Land Act*, 1903, *s.* 83.] The power of the Court to authorize resumption of a holding by the Congested Districts Board for the purpose of migration or the enlargement of holdings under section 83 of the Irish Land Act, 1903, is not limited by the provisions of section 8 (3) of the Land Law (Ireland) Act, 1881, prohibiting (save in the excepted cases) resumption of a holding by a landlord during a statutory term in a present tenancy consequent on the first determination of a judicial rent of that tenancy by the Court. *Congested Districts Board, Landlords; Armstrong, Tenant* - - - - - APP. 174

RETAINER — Legacy — Legatee indebted to firm of which testator was a member 267
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REVALUATION — Union comprising county borough and portions of counties — Apportionment—Liability of contributory bodies - - - - 104, 120
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REVOCATION—*Will — First codicil — Second and third codicils—Legacy—Alteration of amount—Confirmation — Legacy on condition of acting as trustee—Sufficient intention shown.*] By his will, dated October 21st, 1899, a testator bequeathed a legacy of £10,000 to plaintiff, provided he acted as trustee of his will, and in default of his so acting, this legacy was to fall into his residuary estate. By codicil, dated December 6th, 1899, testator revoked this legacy, and in lieu thereof gave plaintiff £8000, subject to the same condition and gift over as contained in the will. By second codicil he confirmed the first, and by third codicil, dated February 24th, 1904, he provided as follows:—"Whereas by my will, dated, etc., I bequeathed to my nephew, Anthony Browne" (plaintiff), "the sum of £10,000, provided he acted as trustee of my said will, now I absolutely revoke said bequest, and in all other respects I hereby ratify and confirm my said will." Testator died in 1904,

REVOCATION—*continued.*
and probate was granted in same year to two of the trustees and executors named in the will, but plaintiff was abroad and stated that he was not aware of testator's death till 1911, when he expressed himself ready and willing to act as trustee of the will, and came back to Ireland and called for a transfer of the trust property to himself and the other trustees. There had been advances of money made by testator to plaintiff on foot of the legacy of £8000 in 1900 and 1901. *Held*, (1) that there had been sufficient compliance by the legatee with the condition; (2) that the third codicil did not operate as a revocation of the first codicil, and that plaintiff was entitled to the legacy of £8000 given to him by the first codicil, after giving credit for money paid to him in advance in respect of said legacy. *Browne* v. *Browne*, - - - - - BARTON, J., 272

SALE—Conditions of—Distillery sold as going concern — Expenses of sale of whiskey
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—— Land Purchase Acts — Congested estate — Consent of Congested Districts Board
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—— Land Purchase Acts — Negotiation fee — Trustee for sale and his partner 341
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—— Land Purchase Acts—*Prima facie* title of vendor displaced — Bonus — Disposal of
See BONUS. 4. [22

—— Money charged on land—Sale directed in County Court - - - - 406
See TRANSFER OF ACTION TO COUNTY COURT. 4.

—— Resale by Congested Districts Board—Mining and minerals—Reservation
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—— Trust for — Real estate—Election by *cestui que trust*—Evidence - - - 62
See ELECTION.

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See TRANSFER OF ACTION TO COUNTY COURT. 1.

SERVICE OUT OF THE JURISDICTION—*Practice—Defendant resident in England—Insurance policy—Contract made within the jurisdiction—Rules, Supreme Court, Ireland* (1905), *Order XI, Rule* 1 (*f*).] The defendants were an Insurance Company, having their registered offices in Liverpool, and carrying on business there. Their agent in Dublin approached the plaintiff in Dublin, who signed a proposal there for a policy, and handed it to the agent with the first weekly premium. The proposal contained a declaration by the plaintiff that the conditions of issue printed on the policy immediately upon the delivery thereof should be

SERVICE OUT OF THE JURISDICTION—*continued.*
read by him, and should alone form the basis of the contract between the company and himself. The policy was executed by the company in Liverpool, at their head office, and delivered by their agent to the plaintiff in Dublin. The policy contained conditions as to payment of premiums, days of grace, provisions for revival on lapse, and as to arbitration. *Held*, that the contract was made in Dublin, and that the Court had power to give liberty to issue and serve a writ on the defendants out of the jurisdiction in an action to set aside the policy as *ultra vires*, and for repayment of premiums paid thereunder. *O'Leary* v. *Law Integrity Insurance Co.* - BARTON, J. 479

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54 & 55 Vict. c. 57—Redemption of Rent 12
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3 Edw. 7, c. 37—Irish Land, ss. 1, 3 - 493
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3 Edw. 7, c. 37, s. 24 (13) - - - - 286
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8 Edw. 7, c. 62—Companies, s. 120 - 24
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9 Edw. 7, c. 42—Irish Land, ss. 3, 6, 12 (1) 38
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—— —— s. 58 (2) - - - - - 77
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—— —— s. 65 (1) - - - 429, 445
See FAIR RENT. 2, 3.

SUBDIVISION—*Lands repurchased by owner under section 3 of the Irish Land Act*, 1903—*Holding — Annuity — Apportionment* — 59 & 60 *Vict. c.* 47, *sect.* 38, *sub-sect.* (3)—3 *Edw.* 7, *c.* 37, *ss.* 1, 3.] Where demesne or other lands are resold to an owner by the Irish Land Commission under section 3 of the Irish Land Act, 1903, the Irish Land Commission may, if they think fit, authorize the subdivision of the lands, and apportion the annuity payable in respect thereof, under sect. 38 (3) of the Land Law (Ireland) Act, 1896. *In re Daly's Estate* - - - - - - - APP. 493

SUBSTITUTED AGREEMENT—Irish Land Act, 1909, s. 12 - - - - 38
See BONUS. 3.

SUPERIOR INTEREST—*Apportionment and redemption—Lands sold, subject to larger superior head-rent than immediate head-rent—"Equitable" apportionment—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 31 (3)—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 62 (3).] The lands of *G.*, held by the vendors under a sub-fee-farm grant at a rent of £12 18*s.*, were sold to the occupying tenants under the Land Purchase Acts for £878. The said lands, together with the lands of *B.*, were subject to a superior fee-farm rent of £47 16*s.* 6*d.* The lands of *G.* comprised 167 acres, the Poor Law Valuation being £57 3*s.*, and the judicial rents formerly paid by the occupying tenants, £57 3*s.* The lands of *B.*, which were in hands, comprised 222 acres, the Poor Law

SUPERIOR INTEREST—*continued.*
Valuation being £57 15*s.*, and the "fair valuation," according to the evidence of a valuer, £68 18*s.* 6*d.* The immediate rent of £12 18*s.* was redeemed out of the purchase-money at £335, and in dealing with the superior rent Wylie, J., made an order, pursuant to section 62 (3) of the Irish Land Act, 1903, that the sum of £12 18*s.*, portion of the superior rent of £47 16*s.* 6*d.*, be exclusively charged in respect of the said sum of £335, and be redeemed at that amount, and that the sum of £34 18*s.* 6*d.*, balance of the superior rent, be exclusively charged on the lands of *B.* On appeal from said order by the owner of the superior rent, claiming that, on the facts disclosed, section 62 (3) was inapplicable, and that his superior rent should be apportioned according to the value of the lands of *G.* and *B.* respectively, and that the proper proportion thereof, when so apportioned on the lands of *G.*, should be redeemed out of the purchase-money thereof:—*Held*, by the Court of Appeal, that the order of Wylie, J., should be affirmed—*Per* Holmes and Cherry, L.JJ., on the ground that the order was, in effect, an ordinary apportionment and redemption order, and that the apportionment of the superior rent, as carried out by the order, was "equitable" within the meaning of section 31 (3) of the Land Law (Ireland) Act. 1896. *Per* Cherry, L.J.: Section 62 (3) of the Irish Land Act, 1903, is primarily, if not exclusively, intended for cases where a complete indemnity, by covenant or otherwise, exists against the whole of a rent or rentcharge payable out of the lands. *In re A. O'Brien's Estate* - - - APP. 179

2. —— *Sale of demesne land with a view to repurchase — Costs of owner of superior interest — Liability of vendor where purchase-money is insufficient to discharge such costs.*] The owner of an estate comprising demesne lands sold the estate to the Estates Commissioners under the provisions of the Irish Land Act, 1903, the vendor proposing to repurchase the demesne, part of which was subject to a perpetual rent which had an enhanced value by reason of the covenant for its payment by the predecessor in title of the vendor, who died leaving assets ample to satisfy the covenant. The purchase-money of this portion of the demesne being insufficient to pay in full the redemption price of the rent:—*Held*, that the vendor should be ordered personally to pay to the owner of the rent his costs of and incident to the redemption, and of proving his title. *In re Borrowes's Estate* (No. 2) - - - APP. 97

—— Insufficiency of purchase-money to redeem—Apportionment of loss - - 503
See TENANT FOR LIFE AND REMAINDERMAN. 1.

TENANT FOR LIFE AND REMAINDERMAN — *Lands sold under Land Purchase Acts subject to settled annuity — Deficient security — Arrears exceeding amount of available funds — Apportionment of loss as between tenant for life and remaindermen.*] Lands sold under the Land Purchase Acts were subject to a perpetual annuity payable to a widow for life, with remainder to her children. The deed by which the annuity was secured gave power to the trustees, in case of non-payment, to recover arrears by distress or receipt of the rents and profits of the lands. It also contained a covenant by the grantor with the trustees for payment of the annuity. Since she became entitled the widow had received the entire net rents and profits of the lands, but this net income had always been insufficient to pay the annuity in full. At the time of sale the amount due for arrears of the annuity exceeded £3000. The net amount of purchase-money available for payment of these arrears and the redemption price of the annuity was less than £1000. On a question arising as to how this sum should be applied:—*Held* (1), that the proper way of apportioning the loss arising from insufficiency of income of the lands, as between tenant for life and remaindermen, was to declare the widow entitled only to such diminished annuity as the net available income was sufficient to pay; and (2), as regards the loss that occurred in consequence of the sale (*a*), as to the period prior to the sale (exceeding one year) during which it appeared that the widow had received no income, that the proper mode of adjusting the loss was that provided by sect. 24, sub-sect. 8, of the Irish Land Act, 1903, viz.: to pay to her out of the purchase-money a sum equivalent to one year's rent, less by the amount of any outgoings unpaid at the date of the sale; and (*b*) as to the period subsequent to the sale, that the loss should be adjusted on the principle adopted in *Cox* v. *Cox* (L.R. 8 Eq. 343), viz., to ascertain what principal sum, if invested at the date of sale at 4 per cent. interest, would, with such interest added down to the date of payment, amount to the entire sum available to meet the annuity and arrears, and that the interest so added would belong to the widow, and the principal sum so ascertained would supply the future income for the widow and her children in lieu of the annuity. *In re D. O'Brien's Estate,* - WYLIE, J., 503

2. —— *Sale by tenant for life—Trust for sale—Bonus—Costs—Settled Land Acts*, 1882, *s.* 63; 1884, *s.* 7.] Even though there are trustees in existence who could carry out the sale, and though the effect will be to alter the destination of the bonus, the Court may, where lands are held under a trust for sale, grant permission under s. 7 (2) of the Settled Land Act, 1884, to exercise the powers

TENANT FOR LIFE AND REMAINDERMAN—*continued.*
of a tenant for life for the purpose of effecting a sale under the Irish Land Acts, to the persons beneficially entitled to the income for the time being, where it considers such a course to be for the benefit of all parties, but it will direct such persons to pay the costs of all parties to the application out of the bonus: *Iever's Settlements*, [1904] 1 I. R. 492, followed. *Finch* v. *Jones* M.R. 388

TITHE RENTCHARGE—"*Persons liable to pay*"—*Merging Order—Irish Church Act*, 1869 (32 & 33 *Vict. c.* 42), *s.* 32—*Undertaking landlord—Stanley's Act* (2 & 3 *Wm.* 4, c. 119), *ss.* 17 *and* 24—*Recovery of sum equal to amount of rentcharge from tenant, as rent—Tithe Rentcharge* (*Ireland*) *Act*, 1838 (1 & 2 *Vict. c.* 109), *ss.* 7 *and* 10.] A vendor entered into an agreement with a tenant for the sale of his holding under the Land Purchase Acts. In the agreement it was stated that the tenant held at a rent of £54, payable under a fee-farm grant, dated 1837, being the sum of £49 6*s.* 8*d.*, rent reserved by said grant, and £4 13*s.* 4*d.* added to said rent under the provisions of 1 & 2 Vict. c. 109, s. 10. It appeared that the sum of £54 had been paid since the time of said fee-farm grant by the tenant and his predecessors. The tithe rentcharge in respect of the vendor's whole estate, including the tithe rentcharge payable in respect of the lands comprised in said holding, had been paid by the predecessors in title of the vendor up to 1872. In that year the predecessor in title of the vendor, as the person liable to pay the tithe rentcharge, applied to the Commissioners of Church Temporalities to purchase up the tithe rentcharge payable in respect of his whole estate, and to pay the purchase-money by instalments. A merging order was duly made pursuant to s. 32 of 32 & 33 Vict. c. 42, and the instalments were declared charged on the lands. The instalments had since been paid by the vendor and his predecessors in title, and the last would have been paid off a few years hence. *Held*, that the facts of the case were consistent only with the view that the predecessor in title of the vendor became an undertaking landlord within s. 17 of 2 & 3 Wm. 4, c. 119, and that by virtue of the fee-farm grant of 1837, and s. 10 of 1 & 2 Vict. c. 109, the tenant and his predecessors became liable to pay the £4 13*s.* 4*d.* as rent in perpetuity. *In re Delap's Estate* WYLIE, J., 298

TRANSFER OF ACTION TO COUNTY COURT—*Action for injunction against trespass and damages—Jurisdiction—Separate valuation—County Officers and Courts* (*Ireland*) *Act*, 1877 (40 & 41 *Vict. c.* 56), *ss.* 31, 36.] Where an action is brought which, while in form an action for an injunction and damages, is in substance an

TRANSFER OF ACTION TO COUNTY COURT—*continued.*
action of trespass, the land in dispute being within £30 valuation, the Court may, in the absence of a sufficient reason for retaining the case in the High Court, transfer it to the County Court. A separate valuation may be obtained by either party, from the Valuation Office, for the purposes of the motion to remit. *Melvin* v. *Ballinasloe* (No. 1) *Rural District Council* - - - BARTON, J., 338

2. —— *Assizes—Trial of issues at—Interference with right of way—Trespass—Injunction—County Officers and Courts* (*Ireland*) *Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 36—*Judicature* (*Ireland*) *Act*, 1877, *s.* 42.] The jurisdiction to remit actions at common law is distinct from that relating to the transfer of Chancery suits. An action was brought to restrain interference with a right of way and trespass, and an injunction claimed. The poor law valuation of the plaintiff's lands was £36, but the piece of ground in dispute was of little or no value. The defendant applied under s. 36 of the County Officers and Courts (Ireland) Act, 1877, for a transfer of the action to the County Court, or in the alternative that the issues should be sent to the Assizes for trial. *Held*, that there was no jurisdiction to transfer the action to the equity or to the common law side of the County Court, and that the issues should be sent for trial at the Assizes. *Fitzsimons* v. *Blayney* - M. R. 398

3.——*Declaration of title.*] An action was brought for a declaration that the plaintiff was entitled under a will to possession of three small houses in the town of *W.*, valued at £13. The defendant had recovered possession of one of the houses from the plaintiff by ejectment in the County Court, and had made him tenant at one penny a week; the other two were in the possession of the defendant. The plaintiff alleged that the ejectment had been obtained by suppression of a will; the defendant denied the existence of the will, and relied on an independent title. The defendant moved to transfer the action to the County Court, under sect. 36 of the County Courts (Ireland) Act, 1877. At the hearing of the motion counsel for the defendant asked the Court in the alternative to stay the action as frivolous and vexatious. *Held*, that there was no jurisdiction to transfer the action, and no ground for staying proceedings as frivolous and vexatious. *Davis* v. *Davis*. [M. R. 403

4. —— *Declaration that money is well charged on land—Motion for judgment in default of defence—Sale in County Court directed.*] An action was brought to have two sums of £105 and £45 declared well charged on lands with a licensed house thereon valued at £6. A motion for judgment in default of defence was instituted. The defendant

TRANSFER OF ACTION TO COUNTY COURT—*continued.*
appeared on the hearing of the motion, and asked the Court, without his having served any notice of motion for the purpose, to transfer the action to the County Court. The Court made the usual decree declaring the lands well charged with the sums mentioned, and ordered that in default of payment by the defendant the action should be transferred to the County Court for the purpose of having the decree enforced by sale in that Court, and declared the plaintiff entitled to his costs. *McDonald* v. *Byrne* (3 New Ir. Jur. 37), not followed. *McDermott* v. *Dempsey* - M. R. 406

TRIAL—Of issue at assizes - - - 398
See TRANSFER OF ACTION TO COUNTY COURT. 2.

TRUST FOR SALE — Election by *cestui que trust*—Evidence - - 62
See ELECTION.

—— Leave to tenant for life to sell—Bonus—Costs - - - - - - 388
See TENANT FOR LIFE AND REMAINDERMAN. 2.

—— Trustees described as "my said executors"
See TRUSTEE. 1. [410

TRUSTEE—*Described as "my said executor"—Will—Construction—Power whether personal or annexed to office.*] A testator appointed A, B, C, and D to be executors and trustees of his will, and bequeathed the residue of his freehold and personal property "in trust to my executors aforesaid," and authorized and empowered "my said executors" to sell any real property which they might think advisable, and divide the residue in such proportions as they or the survivor or survivors of them might think fit among the children of S. who might arrive at the age of twenty-one years. A and B renounced the executorship and predeceased D; C renounced the executorship, and disclaimed by deed the trusts of the will. D, who alone acted in the trusts of the will, in exercise of his statutory power appointed the plaintiff and E (since deceased) trustees of the will in his place. *Held*, that the expression "my said executors" was merely a compendious form of designating "executors and trustees," and that the power of sale could be exercised by the plaintiff, the trustee for the time being. *In re Robinson, deceased*; *Sproule* v. *Sproule* - - - M. R. 410

2.——*For the purposes of the Settled Land Acts—Irish Land Purchase Acts—Jurisdiction—Practice—Appointment—Restriction to lands sold under Land Purchase Acts.*] *Held*, by Wylie, J., that the statutory jurisdiction of the Land Commission to appoint trustees of a settlement for the purposes of the Settled Land Acts, 1882–1890, is limited to

TRUSTEE—*continued.*
receiving the purchase-money of lands subject to the settlement, which have been or may be sold under the Land Purchase Acts. *Held*, by the Court of Appeal, that whether there was jurisdiction in the Land Commission to make an appointment without any such limitation, the practice of the Irish Land Commission to make the order limited to lands sold or to be sold under the Land Purchase Acts was too firmly settled to admit of alteration. *In re Tweedy's Estate* WYLIE, J., 393; APP. 395

3. —— *Negotiation fee—Land Purchase Acts—Sale of settled lands negotiated by a firm of land agents, a member of which was a trustee under the settlement, with a power of sale—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 23 (12)—*Claim against purchase-money.*] Settled lands were sold by the tenant for life under the Land Purchase Acts. The sale was negotiated by *A* and *B*, partners in a firm of land agents, pursuant to an agreement entered into with the vendor, under which they were to receive a negotiation fee, which it was admitted was to be divided equally between them. At the time of the negotiation of the sale *A* was a trustee under the settlement, with a power of sale, but subsequently retired from the trust. There was no clause in the settlement enabling the trustees to charge for their services. On a question arising as to whether the claim should be allowed as against the purchase-money:—*Held*, that the moiety of the fee payable to *A* should not be allowed, but that the moiety payable to *B* should, under the circumstances, be allowed. *In re De Courcenay's Estate* [WYLIE, J., 341

—— Condition to act as - - - 272
See REVOCATION.

—— Public - - - - - - 295
See PUBLIC TRUSTEE.

UNDERTAKING LANDLORD — 2 & 3 Wm. 4, c. 119, s. 17 - - 298
See TITHE RENTCHARGE.

UNION CHARGES — Apportionment — Revaluation — Liability of contributory bodies - - - - 104, 120
See RATES.

USER—Fishing by public—Prescription—Inland non-tidal lake - - - - 61
See FISHERY.

WAY—*Conveyance—General words—Easement—Continuous and apparent easement—Unity of possession—Implied grant.*] Two adjoining hereditaments, *A* and *B*, belonging to the same owner were the subject of an absolute order for sale in the Land Judge's Court. Over *B* there was a formed road constructed by the owner and used, but not as a way of necessity, for the purposes of *A*. *B* was dismissed out of Court, and *A*, "with the

WAY—*continued.*
appurtenances," was subsequently conveyed by the Land Judge to a purchaser. *Held*, that a right of way over the formed road passed to the purchaser. *Query*, whether the Conveyancing Act, 1881, applies to a Land Judge's conveyance. *Head* v. *Meara* - - - Ross, J., 262

—— Rectification of fiated agreement—Judicial Commissioner—Jurisdiction- 212, 215
See RECTIFICATION. 1.

WILL—Ademption - - - 104, 306
See LUNATIC.

—— Charitable bequest — Provision for starving and forsaken cats - - - 133
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—— Charitable gift — Religious or charitable purposes—Gift over in case same should fail or become void by reason of death within three months—Failure for other reasons - - - - - 343
See CHARITY. 1.

—— Condition—Legatee acting as trustee 272
See REVOCATION.

—— Condition—Subsequent — Naturalization of devisee—Assumption of name - 288
See FORFEITURE. 1.

—— Forfeiture of gift on returning to England
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—— Issue—Word of purchase - - 1
See ISSUE.

—— Misdescription—Trustees referred to as "my said executors" - - - 410
See TRUSTEE. 1.

—— Power — Whether personal or annexed to office - - - - - 410
See TRUSTEE. 1.

—— Revocation - - - - - 272
See REVOCATION.

—— Support of adult children—Absolute gift to as joint tenants - - - 416
See CHILDREN.

WINDING UP — *Company — Arrangement — Voluntary liquidation — Sanction of the Court— Companies Consolidation Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120—*Practice—Form of order.*] When it is desired to obtain the sanction of the Court to a scheme of arrangement under section 120 of the Companies Consolidation Act, 1908, the practice is to obtain upon originating summons an order convening the requisite meeting or meetings to consider the scheme; if the necessary majority is obtained, the sanction of the Court may then be sought on petition. Form of order, in the case of a company in voluntary liquidation, sanctioning a composition with creditors. *In re John Clarke & Co., Limited* - - - - M.R. 24

WORDS—"Estate" — Irish Land Act, 1909, s. 58 (2) - - - - - 77
See CONGESTED ESTATE.

—— "Issue"—Will - - - - 1
See ISSUE.

—— "My said executors"—Will - 410
See TRUSTEE 1.

—— "Next of kin or issue"—Irish Land Act, 1909, s. 65 (1) - - - 429
See FAIR RENT. 2.

—— "Own use"—Irish Land Act, 1903, s. 48 (1)
See BONUS. 2. [424

—— "Present Tenancy"—Irish Land Act, 1909, s. 65 (1) - - - - 429, 445,
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